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## CASES

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## Court of King's Bench:

WITH SOME

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IN THE

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ALPHABETICALLY DIGESTED UNDER PROPER HEADS;

From the First Year of King WILLIAM and Queen MARY, to the Tenth Year of Queen Anne.

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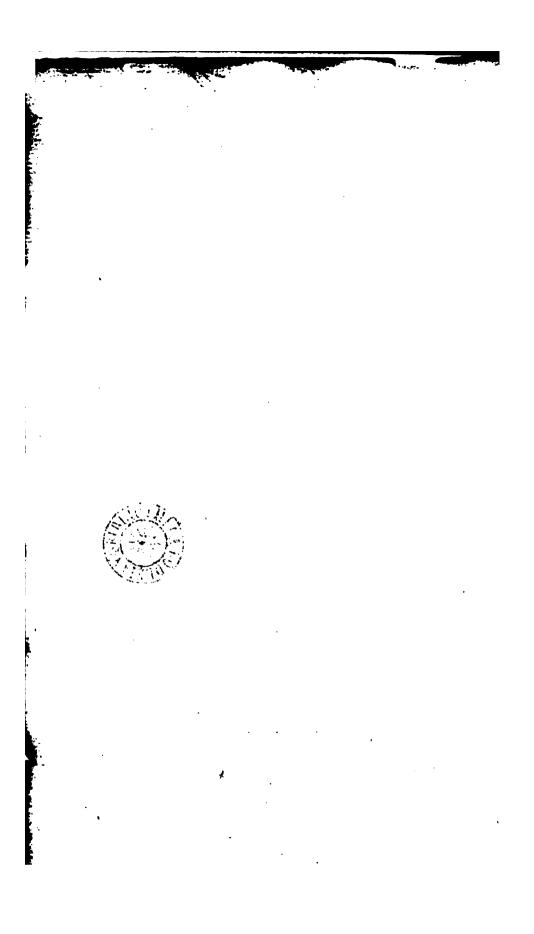
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### **Zaw Common, Canon, Civil,** &c.

#### Blankard versus Galdy.

Trin. 5 W. & M. B. R. Intr. Pas. 3. W. & M. Rot. 35.]

N debt on a bond, the defendant prayed oyer of the Where an unincondition, and pleaded the statute E. 6. against buy-habited country ing offices concerning the administration of justice; is found out and averred, That this bond was given for the purchase lish subjects, all of the office of provost-marshal in Jamaica, and that it laws in force concerned the administration of justice, and that Jamaica diately in force is part of the revenue and possessions of the Crown of there; but in the England: The plaintiff replied, that Jamaica is an island case of an inhabeyond the seas, which was conquered from the Indians bited country conquered, not and Spaniards in Q. Elizabeth's time, and the inhabitants till declared so are governed by their own laws, and not by the laws of by the conquer-or. Vide 3 Keb.

England: The defendant rejoined, That before such con401, &c. 2 And. quest they were governed by their own laws; but since 116. 4 Leon. that, by the laws of England: Shower argued for the 61. 7 Co. Caivin 23. Vaugh. plaintiff, that, on a judgment in Jamaica, no writ of error 279. &c. 2 Vent. lies here, but only an appeal to the Council; and as they 4. Pott. 666. are not represented in our parliament, so they are not 229. 2 Mod. bound by our statutes, unless specially named. Vide And. 45. 2 Wms. 75. 115. Pemberton contra argued, that by the conquest of a Sho. Parl. Ca. nation, its liberties, rights, and properties are quite loft; 31. I Bl. Comthat by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. Vide Vaugh. 405. That error lies here upon Vide Cowp. 208. 2 judgment in Jamaica, which could not be if they were 4 Bur. 2000.

20t under the fame law Et ace Holt C I for Cur.

Doug. 38. not under the same law. Et per Holt, C. J. & Cur.,

1st, In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

2dly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the pos-VCL. II. fethons

S. C. 4 Mod. 215, 222, 223, &c. See the Pleadings. Ibid. Comb. 218. Holt 341.

#### 412 \*

#### Law Common, &c.

fessions and revenue of the Crown of England, the laws of England did not take place there, until declared fo by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: \* That in Davis 36. it is not pretended, that the custom of tanistry was determined by the conquest of Ireland, but by the new fettlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an insidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in fuch cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. Judgment pro quer'.

Post. 510. 5 Mod. 187.

#### Vide Poft. 672.

#### 2. Matthew versus Burdett.

[Hill. 1 Ann. B. R.]

2 Stran. 1057.
Canons oblige not the laity without the confent of the civil legislative power.
Vide Hale's

Hift. of the Law, page 23 to 33.
2 1ntl. 57, 647, 647, 2 Rol. Abr. 226,

4:4 Mo. 782. Br. Ordinary 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palm. 379. 3 Salk. 318. S. C. 2 Vent. 44. 2 Lev. 222. 2 Inft. 97. Cases in B. R. Tempore Lord Hardwicke 57, 326, 395. 1 Bl. Com. 82.

#### Lealeg.

2 Show. 31.

#### Haths versus Ash.

[Trin. 8 W. 3. C. B.]

Lease to commence a datu, includes the day of the Commencement Adjudged by three judges against Treby, C. J. a datu. Vide post. 625, 627. But note, a die datus excludes the day (a). Vide 5 Co. I. 1 Salk. 44. 94 B. 2 Co. 55. 2 Bulft. 83, 305. 3 Bulft. 203. Aleyn 77, 2 Mod 215. Ray. 84. 5 Co. 21, 100. Cro. Jac. 258, 18, called Hatter ver. Ashe. Al. 77. 1 Rol. R. 8, 3. 2 Wilson 176. 2 Ib. 165. 2 Ld. Ray. 1242.

(a) R. in the case of Pugb and the Duke of Leeds, Cowp. 714., that a leafe to commence from the day of the date is good, under a power to grant leafes in possession only, and not in reversion. The case has been since adopted as a

ruling decision, that from any time is to be construed exclusively or inclusively, as may best effectuate the act intended to be done by the parties. 5 T. R. 286.

#### Stomfil versus Hicks.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 280. S. C.]

Leases to B. for a year, and from year to year as and so from year long as it shall please both parties. Adjudged that to year, quamthis is a lease for two years, and afterwards at will; and diu, &c. this is a lease for two years, and alterwalus as will, post. pl. 6. fo it was ruled inter Bellasis and Burbrich. Hill. 8 W. 3. Holt 414.5. C. 1 Will. 262.

3. A. possessed of a term for 100 years, grants the land, Termor for years habendum for 40 years, to commence after his death. grants for a less This is a good new lease; and if H. possessed a term mence after his for 20 years, grants the tenements for nineteen years, to death, good. commence after his death, this will be good for so much i Sid. 359of the twenty years as shall be unexpired at the time of Lutw. 213, his death. Ruled by Holt, C. J. at Lent affizes at Dor- 214 Alleyn 4. chester, 10 W. 3. Gree versus Studley.

Cro. Jac. 71. 6 Co. 36. 1 Lev. 35 4. If A. demise lands to B. for a year, and so from year Lease for a year to year, this is not a lease for two years, and afterwards and so from year to year, quant-

(a) S. C. Lut. 313. quod vide: point as here stated. 1 T. R. 380. Vide also some observations on the

Cro. El. 775.

i., and when it may be determined. Vide will may determine his wi.l. Vide infra.

diu, &c., what it at will; but it is a lease for every particular year, and after the year is begun, the defendant cannot determine the leafe before the year is ended. But in a leafe at will, prix. p. When the defendant may determine his will after payment of his rent, at the end of a quarter, but not the beginning, lest the lessor should lose his rent (a). The lessor cannot determine his will in the middle of a quarter, without permitting the tenant to have the emblements. Ruled by Holt, C. J. at Summer affizes at Lincoln, 1699 (b).

(a) Cited & T. R 630.

(b) Courts of law have of late years leaned as much as possible against conftruing demises, where no certain term is montioned, to be tenancies at will; but have rather held them to be tenancies from year to year, so long as beth parties please, especially where an annual rent is reserved. 2 Bl. Com. 147. In Timmins v. Rozvlinson, 3 Bur. 1601, 1609., it is faid, per Cariam, that leafes at will, in the firict legal notion of a leafe at will, exist now only notionally: upon which Mr. Hargreuve remarks, that he prefumes the observation means not that effates at will may not asife now as well as formerly, but only that it is no longer usual to create such estates by express words, and that judges incline strongly against implying them. Note 3 to Co. Lit. 55. a., Ros ex Jem. Bree v. Loss, 2 Bl. Rep. 1171. Where lands, the greatest part whereof were enclosed, but some were in an open common field, were taken generally by parol at an annual rent, and a custom was proved in the parish, that when any tenant took a farm, in which there was any open field land, more or less, for an uncertain term, it was confidered as a holding from three years to three years. This was ruled to be a tenancy from year to year, and the custom was deemed invalid. Lord Ch. J. De Grey faid, All leafes for an uncertain term are, frima facie, leafes at will; it is the refervation of an annual rent that turns them into leafes from year to year: it is possible that cultom may make them leafes for a longer term, as where the crop (as of liquorice or medder) does not come to perfection in less than two years; and I will not fay that the nature of the

ground, or the course of husbandry, may not deserve to be considered when fuch a case comes nakedly before the Court. The interest of tenant from year to year devolves upon his execorors or administrators. Doc ex dem. Shore v. Potter, 3 T. R. 15. The tenancy can only be determined at the end of a year, and upon giving a full half-year's notice. Right ex dem. Flower v. Darby, 1T. R. 159. vide Parker en dem. Walker v. Constable, 3 Wils. 25. When any fuch tenancy has commenced, it continues against any person to whom the leffor may afterwards grant / last the reversion, Birch v. Wright, 1 T. R. 378.; or any person to whom it may come, though an infant. Madden ex dem. Baker and others v. White, 2 T.R. 159. If tenant for life demise for years and die, and the reversioner permit the under-tenant to continue in pofse sion, and receive the rent from him according to the terms of the leafe, it is evidence of an agreement that the tenant shall continue to hold from year to year, from the day, and according to the terms, of the original demife. Rie v. Ward, 1 Hen. Bl. 97. On an agreement to let a farm, to hold part from the 13th February, another part from the 5th April, and the remaindir from the 12th May, and to pay rent at Old Lady-day, (5th April,) and old Michaelmas, the tenancy of the whole is substantially from Old Ladyday; and notice fix months before that day to quit on the days of entry is inficient. Dee ex dem. Daggett v. Snowden, 2 Bl. 1224. Where an agreement for a longer term than three years is made by parol, which is void as to the duration of the term, there is a tenancy from year to year regulated

in every other respect by the agreement. Dee ex dem. Rigge v. Bell, 5 T. R. 471. The time for giving notice may be different from half ayear, by agreement, or the custom of particular places, semble, Timmins v. Rowlingen, Doe v. Snowden, ubi fup. Butl. no. to Co. Litt. 270. b. Vide Oukapple v. Capous, 4 T. R. 451. 5 T. Rep. Per Buller, J. Lanc. Lent assizes 1790, on notices to quit, if no time of entry

appear, the custom of the country shall be, prima facie, evidence; if there is no fuch custom, the ient-days shall be deemed the day of entry; if there are two rent-days, the plaintiff's notice shall be presumed right, until the defendant prove it to be wrong; and if the tonant outers about the usual day, the entry shall relate to such day. Vode Espin. N. P. 401 b.

#### Leighton versus Theed.

[Hill. 13 W. 3. B. R. 1 Ld. Raym. 707. S. C.]

IF H. holds land at will, rendering rent quarterly, the When leffer or lessor may determine his will when he pleases; but if lesse as will may determine his he determines it within a quarter, he shall lose the rent will. Vide supra which should \* have been paid for that quarter in which he & prox. p. Vide determines it. So the leifee may determine it when he Co. Lie. 55. b. pleases, but then he must pay the quarter's rent. Per \* [414] Holt, C. J. (a).

(a) Vide Butl. Co. Lit. 270. b. n. t.

### Legg versus Strudwick.

[Hill. 7 Ann. B. R.]

IN replevin the defendant avowed, for that he being Parol demise to scised in see of the locus in quo, demised the same to A., hold from year, to year, to he habendum de anno in annum & sic ultra quamdiu amhabus par- ultra quamdiu, tibus placeret, to commence from Lady-day 1703, rendering &c., is a lease for an annual rent, payable quarterly. The leffee entered, and two years, and after every fubdied the 17th of December 1706. And the rent for a year fequent year beand a half ending at Chrisimas before was arrear, for which gun, not deterand a half ending at Coryimas Delote was arrear, to, which minable till that the leffor entered and distrained. To this the plaintiff debeended. See murred. Et per Curiam it was held, first, That after the p. 413 1 Med. two years, the lessor or lessee might determine; but if the 4. I Lutw. 213, leffee held on, he was not then tenant at will, but for a 214 Rep. A Q year certain; for his holding on must be taken to be an 417. And not agreement to the original contract (a), and in execution of void by the stait; and the first contract was from year to year. 2dly, tute of frauda. The third year is not in the nature of a diffinct interest, because it arises from the same executory contract, and therefore the leffer may diffrain the third year for the rent

(a) R. acc. 1 T. R. 378. Vide 3 T. R. 16. Rep. B. R. Tomp. Hard. 305. Daug. 378. 1 Will. 262. of the second; and such an executory contract as this is not void by the statute of frauds, though it be for more than three years, because there is hereby no term for above two years ever subsisting at the same time; and there can be no fraud to a purchaser, for the utmost interest that can be to bind him, can be only one year. And Holt, C. J. cited this case coram Hale, C. J. A composition was agreed upon between the parson and his parishioners for tithes quamdiu ambabus partibus placuerit. If the parishioner ploughs and fows, the parfon shall not that year recede, and demand tithe in kind, but must make his election at the beginning of the next year; for the parishioner would not perhaps have fowed his land, but that he relied upon his contract. Cro. El. 775, Keilw. 65. Alleyn 4. 2 Jon. 5. 1 Sid. 359. 14 H. 8. 10.

Vide post 464, 508, 547.

### Legacy.

### Ewer versus Jones. [Mich. 2 Ann. B. R.]

Action lies for a T T was held by Holt, C. J. clearly, that a devisee may legacy devised maintain an action at common law against a tertenant out of land. See 2 Show. 36, 37. for a legacy devised out of land; for where a statute, as I Chan. Cases 57, the statute of wills, give a right, the party by consequence 257, 258. 1 Ch. shall have an action at law to recover it (a). prox. pag. Mod. Cases 26. 6 Mod. 26. Holt 419. S. C. 2 Ld. Raym. 937. S. P. 3 Salk. 217. S. C. not S. P.

to a very different subject (the pleading the statute of limitations to a 2 Ld. Raym. 937., but in both those it is wholly unnoticed.

(a) The question in this case related books it is tacked at the end of the case, without shewing how the Ch. Justice connected it with his argument. In firt in the admiralty for wages). The Holt 419. it is mentioned (as here) point here stated is mentioned in the without any reference to the principal reports of the case, 6 Mod. 26, and case. In Com. 137., and 3 Salk. 227.,

#### Smell contra Dee.

[Mich. 6 Ann. In Canc.]

Bequeathed by his will in these words, viz. I give Where a time is annexed to the two children of J. S. at the end of annexed to the ten years after my decease: The children died within the to the payment, ten years ofter my accease. The chancellor, This is a and legatee dies ten years. Et per Comper, Lord Chancellor, This is a before that time, lapfed legacy, and shall not go to the executors of the it is lapfed. children; for the diversity is where the bequest is to take Hugh's Abr. effect at a future time, and where the payment is to be 1 pt. 664. c. 14. made at a future time. And though it was objected by Sir Thomas Powys, that this differed from the case where a man devised 100%. to J. S. at his age of twenty-one, because it is a contingency whether he attain to that age; but the expitation of the ten years is inevitable; yet the Lord Chancellor answered, that wherever the time is an-nexed to the legacy itself, and not to the payment of it, 366. 2 Chan. if the legatee dies before the time of payment, it is a lapsed 188 Sec. Chan. legacy in that case. Vide Dy. 59. b. 2 Vent. 342. Off. Cases 60, 196. Ex. 347. Swinb. 311, 313. (a)

If a legacy be devised generally, and no time ascertained 183, 188. for the payment, and the legatee be an infant, he shall be a Vern. 508, paid interest from the expiration of the first year after the 673. testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and fo long the executor shall have, that it may appear whether there be any debts; but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable, but upon demand, and he shall

1 Chan. Rep.

(a) Vide 1 Br. Cb. 119., and notes in 2d ed. thereof 191, 298. Forrefter 117. 2 Atk. 185. 1 Vex. 44, 208. 1 Wms. 566. 3 Bro. P. C. 337. 2 Bro. Cb. 75. 3 Bro. Cb. 298, 473. Butl. note to Co. Lit. 237. 2 Cb. Ca. 155. 1 Eq. Ca. Ab. 295. 1 Vern. 225. 3 Atk. 427. 2 Wms. 612. In 1 Brown. 298., 3 Brown. 473.,

this subject is very fully investigated, and the feveral cases relative to it are considered. The result as to personal legacies is as flated in the authority last mentioned. That when the time is mentioned as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necellary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if the testator intended it as a condition precedent upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arrives. The word if is always confidered as conditional; at such a time, is also held to be attached to the substance of the legacy; when is merely to denote the time of payment; giving interest in the mean time also shews the legacy to be immediately vested.

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not have interest but from the time of his demand; otherwise it is in case of an infant, because no laches is imputed to him. But where a certain legacy is lest payable at a day certain, it must be paid with interest from that day (a). Et nota; The interest allowed is 51. per cent. (b), per Cowper, Lord Chancellor.

(a) Legacies chargeable upon land yielding present profit, (or rents charge, Stonebouse v. Evelyn, 3 Wms. 252.), mortgages carrying interest, or stocks yielding profits half-yearly, carry interest from the testator's death. Those given out of the personal estate, or charged on a dry reversion, from the end of a year asterwards, Maxwell v. Wettenball, 2 P. Wms. 25. In Knapp v. Powell, Prec. Ch. 11. 2 Eq. Ca. b. 564., a segate who had no notice of his legacy or the testator's death, till the executor published it in the Gazette, and then demanded it, was not allowed any interest.

In Joliff v. Crow, Prec. Cb. 161. 1 Eq. Ab. 286. 2 Eq. Ab. 565., it was ruled that a legacy payable on a certain day, should only carry interest from the time of its being demanded. But in East v. Thornbury, 3 Wms. 125., where a legacy was given to A. payable at the end of a year from the teltator's death, and A. after that period intermarried with B., who received interest from the marriage for some years, and then received the legacy and gave a receipt; A. and B. were allowed to recover the interest which had accrued from the end of the year until the intermarriage. Where a legacy was to be paid within five years, interest was decreed from the end of the five years, Lloyd v. Williams, 2 Atk. 110. Vide Biljon v. Suunders, Bunb. 240. See Ca. Cb. 72.

If a parent gives legacies to his children, payable at twenty-one, or any other given period, without making an express provision for their maintenance, they are entitled to interest in the mean time; but it is otherwise with respect to legacies by strangers. Attorney-General v. Thompson, Prec. Ch. 337.

1 Eq. Ab. 301. Harvey v. Harvey, 2 P. Wms. 21. Green v. Belcher, 1 Aik. 505. Incledon v. Northcote, 3 Aik. 430, 438. Heath v. Perry, 3 Aik. 102. Such a legacy by a grandfather does not carry interest, Palmer v. Mason, 1 Aik. 505. Butler v. Freeman, 3 Aik. 58.; nor does a legacy from a father, if other maintenance is expressly provided, Hearle v. Greenbank, 1 Vez. 299, 307.

If certain property in the funds is specifically bequeathed, the legatee is entitled to the produce from the testator's death; but it is otherwise it a quantity of stock is given generally, Sleech v. Thorington, 2 Vez. 560.

With respect to interest, when a legacy is given in prassenti to an infant, and limited over upon his dying under age, vide Lillcott v. Compton, 2 Vern. 638. Tisson v. Tisson, 1 Wms. 500. Green v. Eakins, 2 Atk. 473. Chaworth v. Hooper, 1 Bro. Ch. 82. Hawkins v. Coombe, 1 Bro. Ch. 335. Shephard v. Ingrain, Ambler 448. Taylor v. Johnson, 2 Wms. 504.

With respect to points on the confiruction of wills relative to this subject, vide Acberly v. Wheeler, 1 Wms. 783. Heath v. Perry, 3 Atk. 101. Beckford v. Tohin, 1 Vez. 308.

(b) Bryant v. Speke, 1 Vez. 171., Per Ld. Chancellor, The general rate is, that legacies out of real estate carry one per cent. lower than the legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the Court to vary therefrom; but for that a special case must be made. Vide Beckford v. Tobin, 1 Vez. 308. Moore v. Moore, 3 Ask. 402. Ld. Trimlestown v. Colt, 1 Vez. 277.

#### Hern contra Merick.

[Ceram Harcourt, Lord Chancellor. In Canc. S. C. 1 P. Wms. 201. Gib. Chan. 307. 1 Eq. Ca. Ab. 143. pl. 11.]

Scised in see, and indebted by bonds, by will gives Where real estate legacies to children, (whom he had otherwise prowided for before,) and devices his land to his eldeft fon in equity. Vide tail. The eldest fon, being also executor, pays the bonds ante 415.
with the personal estate; and now the legatees brought a 1 Chan. Rep. bill to come against the real estate in the place of the bond 2 Chan. Rep. creditors, and be paid out of the land. The Court feemed 200. 1 Chin. to admit, that if the lands had descended, the legatees Case 57, 257, 258, 1 Willow might have been relieved in this manner; but fince the 24. 2 Atk. 614. testator had devised them, it was resolved, that they ought 1 Vent. 31. to be exempted; for it was as much the testator's inten. 2 Vern. 727. cion that the device should have this land as the other Chould have the legacies, and a specific legacy is never broke into, in order to make good a pecuniary one. Also this cale is out of the statute against fraudulent devises, because the debts are paid, and the children being otherwife provided for, are not in the nature of creditors. Nota: This case was upon an appeal from the decree of Skin. 158. the Master of the Rolls, who held, that the real and perfonal estate should be so charged, that both the debts and legacies thould be paid (a).

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(a) In Clifton and Burt, 1 P. Wms. 679., it was ruled, that an offate dewifed in fee should not be charged with a legacy where the personal citate was exhausted by a specialty debt. The whole law upon this subject is thus collected in a note to that case by Mr.

" It being the object of a court of equity, that every claimant upon the affets of a deceased person, shall be fatisfied as far as such assets can by any arrangement confiftent with the nature of the respective claims, be applied in fatisfaction thereof; it has been long settled, that where one claimant has more than one fund to refort to, and another claimant only one, the first claimant shall refort to that fund on which the second has no lien. Laney v. Duke of Atbol, 2 Ath. 444. Lacam y. Mertins, 1 Vez. 312. Mogg v. Hodges, 2 Vez. 53. If therefore a specialty creditor, whose debt is a lien on the Vol. II. real affets, receive satisfaction out of the personal affets, a simple contract creditor shall stand in the place of the specialty creditor, against the real affets, so far as the latter shall have exhausted the personal assets in payment of his debt. Anon. 2 Chan. Ca. Sagitary v. Hyde, 1 Vern. 455. Neave v. Alderton, 1 Eq. Ca. Ab. 144. Wilson v. Fielding, 2 Vern. 763. Galton v. Hancock, 2 Atk. 436. And legatees shall have the same equity as against assets descended, Culpepper v. Aston, 2 Chan. Ca. 117. Bowaman v. Reeve, Pre. Cha, 578. Tipping v. Tipping, 1 P. Wms. 730. Lucy v. Gardiner, Bunb. 137. Lutkins V. Leigh, Ca. Temp. Talb. 54. So where lands are subjected to the payment of all debts, a legatee shall stand in the place of a fimple contract creditor, who has been fatisfied out of personal affets, Hazlewood v. Pope, 3 P. Wms. 323. So where legacies by will are charged

on the real estate, but not the legacies by codicil, the former shall resort to the real affets upon a deficiency of the personal assets to pay the whole, Hyde v. Hyde, 3 Chan. Rep. 83. Masters v. Masters, 1 P. Wms. 422. Bligh v. Earl of Darnley, 2 P. Wms. 620. But from the principles of these rules it is clear, that they cannot be applied in aid of one claimant so as to descat the claim of another; and therefore a pecurriary legatee shall not stand in the place of a specialty creditor as against land devised, though he shall as against land descended. Clifton v. Clifton. Hazlewood v. Pope. Scott v. Scott, Ambler 383. But fuch legatee shall stand in the place of a mortgagee, who has exhaulted the personal affets to be satisfied out of the mortgaged premises, though specifically devised, Lutkins v. Leigh, Ca. Temp. Talb. 53. Forrester v. Ld. Leigh, Amb. 171. For the application of the perfonal affets, in case of the real estate mortgaged, does not take place to the defeating of any legacy.

Mead, 1 P. Wims: 693. Oneal v. Titping v. Tipping, 1 P. Wms. 730. Davies v. Gardiner, 2 P. Wms. 190. Rider v. Wager, 2 P. Wms. 335. And it is to be observed, that none of the rules abovementioned subject any fund to a claim to which it was not before fubject, but only take care that the election of one claimant shall not prejudice the claims of the others, 2 Atk. 438. 1 Vez. 312. So in Robinson v. Tonge, ac. 15 Od. 1739. A. seised of free-hold and copyhold lands, mortgaged the same, and died indebted by mortgage, and on several bonds. The

specialty creditors insisted that the Court, in marshalling the assets, should. cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate. But the Court faid that copyhold estates were not liable, either in law or equity, to the testator's debts, further than he subjected them thereto; and ordered, that the copyhold estate should bear its proportion with the freehold estate, for payment of the mortgage; and should not be liable to make satisfaction for the specialty debts. Reg. Lib. B. 1738. fol. 483. It is now settled, that the Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. Mogg v. Hodges, 2 Vex. 52. Attorney-General v. Tindal, Amb. 614. Foster v. Blagden, Amb. 704. Hillyard v. Taylor, Ambler 713.

Where a legacy is payable out of a mixed fund of real and personal estate, payable at a future day, and the legatee dies before the day of payment, quere, Whether the Court will marshal affets so as to turn such legacy upon the personal estate? in which case it would be vested and transmissable; whereas, as against the real estate, it would fink by the death of the legatee. Vide Prowfe v. Abingdon, 1 Atk. 482. Pearfe v. Taylor, Trin. Vac. 1790, before Ld. Thurlow. As to the right of a wife to have asfets marshalled in respect of her paraphernalia, vide Tipping v. Tipping, 1 P. Wms. 729. Tynt v. Tynt, 2 P.

Was 542.

### Libellus Famolus.

#### Dominus Rex versus Bear.

[Hill. 10 W. 3. B. R. 1 Ld. Raym. 414. S. C.]

INDICTMENT for composing, writing, making, The whole libel and collecting several libels, in uno quorum continetur need not be set forth in indictinter alia juxta tenorem & ad effectum sequent, and then ment, but if any fets out the words. Upon not guilty pleaded, the jury part qualifies the found the defendant guilty as to the writing and the col-rest, it may be lecting prout in indictamento supponit' & quoad omnia alia dence. See preter scriptionem & collectionem not guilty. An exception 5 Mod. 16;, was taken in arrest of judgment, that inter alia shewed 164, &c. 1 Sid. there was something else which perhaps might, if it ap- 270, 271. peared, qualify the rest...

Et per Cur. Non allocatur; for if that had been the case, 5 Co. 125. the desendant could not have been sound guilty; and re-Hard, 470. gularly, where a man speaks treason, God fave the king Faresty 91. Vide 2 Ro. Rep. 89. And it is not 1 Danv. 156. will not excuse him. necessary to set forth all the libels; but if any thing qua
1 Vent. 25.
2 Sid. 103.

lify that which is fet forth, it must be given in evidence. 4 Co. 14. b.

2dly, It was agreed, ad effectum sequentem of itself had Hade 223. been naught; for the Court must be judge of the words Yelv. 117. themselves, and not of the construction the prosecutor puts 1 Bulft. 151. upon them; but juxta tenorem sequent' imports the very 2 Brownl. 100. words themselves. Vide Co. Entr. 116. Reg. 169. For Saund. 191. 2 Saund. 369. the tenor of a thing is the transcript: And Rokesby said, 3 T. R. 423. n. the words ad effectium were loose and useless words; and Mod. Cale. 102, the words, juxta tenorem, being of a certain and more strict 103. Post. 660. fignification, the force of the latter was not hurt by the former, for utile per inutile non vitiatur; quod Holt, C. J. concessit; and the case of Saltashe, H. 23 & 34 Car. 2. B. R. Rot. 1154. was remembered and agreed; and all were of opinion, that the words ad effectum were corrected by the words juxta tenorem.

3dly, It was held, that the finding guilty of bare writ- Copying a libel ing and collecting was criminal, not but that collecting is criminal. had been better out of the case; for, per Holt, C. J., bare 5 hiod. 165. copying out of a libel, by one that is neither contriver nor compoter, is highly criminal; and as to this the Chief Justice said, the essence of a libel consists not in the ima- Essence of a libel mous matter, for if a man speaks such words, unless the confits in the

See 4 Co. 14, 15. 5 Co. 125, &c. 9 Co 53, 59. 3 Inft. 174. Mo. 813, 627. 1 Sid. 242. 2 Show. 468, 471, 488. Poft. 646. S. C. Ante 324. 3 Salk. 226. Cafes B. R. 218. Holt 422. Carth. 407

words writing.

TL Rep. 3º6. Bur. 2686. 4 Mod. 167. Gilb. Law of Exidence, by Leffe bas.

words be put in writing, he is not guilty of a libel; but the nature of a libel connils in putting this infamous matter into writing; and therefore if Bear writ such matter, he is a libeller; for it was not a libel till it was written; and in all cases where a man does that act, which makes a thing to be what it is, he is and must be construed to be the doer of that thing. This is feen in all offences, from the highest to the lowest.

If H. contrives any treasonable matter, and another writes down the contrivance, the writer is as guilty as the Where an act of parliament makes fodomy felony, and favs nothing of the abettors, if B. should stand by and hold the door while A. committed fodomy, B. would be as guilty of felony as A. So in 3 Inft. 59., where an act of parliament makes any thing felony, though nothing be faid of the accessaries in the statute. So in the lowest offences, where there are no accessaries, but all are principals, as if H. should hold A. while B. beats him, he is guilty of the battery.

So in the principal case, he that does that without which the thing could not be what it is, viz. a libel, can-

not be construed to be innocent.

He that writes a £ 10.

It is objected, that it is held in 9 Co. 59. Lamb's case, There is the con-siver. 3 Modes. that a libeller must be either the contriver, procurer, or 1 Hawk. c. 73. the publisher. But this ought to be expounded by Moor 813. where the writer is held to be in law a contriver; and then that ground of my Lord Coke's may be admitted to be law; otherwise it will be doubtful; for if that case be looked into, the question there was about the publication of a libel; and it was held, that writing the copy of a libel was not a publication, but only evidence of a publication; but there was no question made how far he was guilty of libelling; and for the matter of publication, Having a written the bare having a libel is not a publication. If a libel be libel, is evidence publicly known, having a written copy of it, is an eviof a publication dence of a publication; but otherwise where it is not See 5 Mod. 165. known to be published.

copy of a known

9 Mod. 68.

It is objected, that writing a libel may be a lawful act, as by the clerk that draws the indictment, or by a student who takes notes of it; and so the defendant's might be a lawful writing.

Where a matter is unlawful in general, a general allegation

Enr. 2657, 2667. 2 bi. Rep. 1038.

To this the Chief Justice answered, that the matter abstractedly considered is unlawful, therefore the general finding shall be taken to be criminal; and that if the writthall be so taken, ing was innocent, as in the case objected, there ought to be a special finding of these particulars, which distinguish and excuse it. If an action be brought on the statute of maintenance, it is sufficient to say, quod manutenuit; yet in some circumstances a man may lawfully maintain a suit, as an atterney or a near relation; yet because it is unlawful

in abstracto, that general allegation is enough, and shall be understood of an unlawful maintenance; and farther, it cannot be understood of such a writing; for if an \* officer or student does it, it is no libel because it is not done ad infamian of the party, but to bring the offender to punishment, and it is only tenor libelli, and upon such evidence the defendant could not be found guilty. The case in 3 Inst. 174. is a strong case: In that case 7. de Northampton is charged with writing only, and there is no mention made of a publication.

I am not under any necessity of giving my opinion, whether writing a copy of a libel be writing of a libel? for if it be not, then jury having found the defendant guilty of writing a libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence. On the other fide, if the copy of a libel be a libel, then the writing of it is a great offence: But that people may not go away with a notion, that writing of a copy, though by one that has no warrantable authority, is not libelling, the Chief Justice faid, that fuch a copy contained all things necessary writing a copy to the constitution of a libel, viz. the scandalous mat- of a libel withter, and the writing; and it has the same pernicious conwriting a libel. fequence; for it perpetuates the memory of the thing, 5 Mod. 164, 165. and some time or other comes to be published; therefore Pop. 139. he held, that writing a copy of a libel was writing a libel; Wooton's Cafe. and if the law were otherwise, men might write copies 3 Inft. 134and print them with impunity.

Further, the Chief Justice said, that the defendant had great favour in the verdict, for when a libel appears under a man's own hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. A man could have no temptation to write such libels, but rancour against the

government.

Lastly, It was objected, that the defendant being found Cro. Car. 125. guilty of collecting and writing, and not of making and composing, the verdict is repugnant, or an acquittal; fed non allocatur; for making is the genus, and composing and contriving is one species; writing, a second species; and procuring to be written, a third species; so that not finding him guilty of all, but writing only, is finding him not guilty of any species of making, but writing. Justin. Inft. lib. 4. cap. 4. par. 1. de injuriis, and Bract. lib. 3. Fitz. tit. Coron. 135. Bare writing was punishable in the Starchamber. Hob. 62, 215. 12 Co. 35. Helt 4. Moor 421. Dy. 372 .- Judgment pro rege.

Far. 49. See 1 Saund. 37. 2 Saund. 66, 120, 125. I Sid. 305. Hutt. 109. Cro. Car. 163, 513, 535. 5 Mod. 426. 2 Mod. 71, &cc. Vid. 1 Lev 149, 143. S. C. Carth. 136. 1 Show. 98.

### Limitations.

#### Hall versus Wybourn.

[Trin. 1 W. & M. Rot. 130. B. R.]

Defendant's being beyond sea does not avoid the flatute of limitations. Comter. 190. 2 Mod. 311. Note; the law

N bar of the statute of limitations, the plaintiff replied, that the defendant was beyond fea, and it was held no plea, for the plaintiff might either file his original, or outlaw him; and in one Bynton's case, it was held by Bridgman, C. J. that though the courts of justice were shut up fo as no original could be filed, yet this statute would bar is now altered by the action; because the statute is general, and must work flat. 4 & Ann. upon all cases which are not exempted by the exception. 465. 2 Vent. 256. 3 Lev. 21, 283, 367. 6 Mod. 240. Show. 99. Jon. 253.

#### Budd versus Berkenhead.

[Trin. 2 W. & M. B. R.]

In replication to of limitations, the continuances must be shewn. See 2 Show. 79. 3 Mod. 111, 112. 1 Lord Raym. 435. 2 Str. 739. 2 Atk. 305. 1 Winf. 167.

c. 16. 1 Sid.

In replication to DEFENDANT having pleaded the statute of limitations, the plaintiff replied in avoidance, that he fued out an attachment returnable Mich. 34 Car. 2. Et quod superinde taliter processium fuit, that the desendant in Michaelmas term, 2 Jac. 2., appeared, &c. Et per Cur. This pleading is not good; it must be shewn that there were continuances till the time of declaring, and a taliter processium is not sufficient to shew a matter before declaration, though it has been held fo for matters after.

Bull. N. P. 151. 3 T. R. 6(2. 1 Espinasic 157. Coventry versus Apsley.

[Mich. 3 W. & M. Rot. 411. B. R.]

Imprisonment, statute of limitations pleaded to part. Plainply, it was one continued durefs. Comb 1. 25.

TRESPASS for imprisoning him, and detaining him in prison from 32 Car. 2., till the 3d of April, 4 Jac. 2. The defendant pleaded as to all, till 34 Car. 2., tiff ought to re- fuch a day, non cul. infra quatuor annos; and as to the rest, a plaint and a capias issued. The plaintiff demurred. Et vide post pl. 11. per Cur. Though the imprisonment be complained of as one continued imprisonment, yet the desendant may divide the time, and plead the statute as to part, and the Salk. 638. Bull. plaintiff may reply the continuance; therefore as to this, N. P 24. 2 H. Black. 16. judgment was given against the plaintist upon his demurrer, but for him as to the rest; because the capias was awarded by the Court ex officio, and it did not appear that the defendant meddled in it.

### \* 4. Cary & Ux. versus Stephenson.

[Paf. 6 W. & M. B. R. Intr. Hill. 5 W. & M. Rot. 37.]

Was indebted to A. who died, B. received the money, and afterwards the plaintiff's wife took out intestate's money, and afterwards the plaintiff's wife took out intestate's money, and after and ministration to A. and ministration letters of administration to A., and within fix years after wards adminithe letters of administration, but not within six years after stration was the receipt of the money, brought an indebitatus assumpsit The cause of acagainst B. as for money had and received to the use of him tion accrues by and his wife; the defendant pleaded non affumpfit infra fex the administraannos; the plaintiff replied the special matter; and, upon 1 Chan. Cases demurrer, the Court were of opinion, that the statute 152. 2 Chancould be no bar, because the plaintiff's title commenced Cases 217. & by taking out letters of administration, and this was not 4 Mod. 376. a cause of action in the intestate; but they thought it Carth. 325. S. C. hard to make this so much money received to the plain- 2 Saund. 150. tiff's use, when at the time of this receipt, he was not Stephenson. administrator. Note; There was a faulty replication, and 2 Cro. 60, 61. the Court advised the plaintiff to bring a new action, and Holt 58. Goulf.

fo the matter went off.

607. Fitzg. 81.

#### \* 421

Comber. 311. S. C. called Curry & Ux. ver. Stephens, Skin. 555. 573. A 204

#### Stokes versus Berry.

[ At the Summer Assixes at Lincoln, 1699. Coram Holt, C. J. 1 Ld. Raym. 741. S. C. named Stocker versus Berney.]

IF A. has had possession of lands for twenty years without Twenty years interruption, and then B. gets possession, upon which possession is a A. is put to his ejectment, though A. is plaintiff, yet ejectment for the possession of twenty years shall be a good title in him, the plaintiff, as as if he had still been in possession. Ruled per Holt, C. J. well as defendant. Holt 264.

The same point was ruled by Holt, C. J. at Lent assizes S. C. 1 Mod. for Bucks, 12 W. 3., because a possession for twenty years Cal. 287. Post. is like a descent, which tolls entry, and gives a right of 685. possession, which is sufficient to maintain an ejectment.

S. C. Far. 12. vide ibid. €.

#### Green versus Rivett.

[Pal. 1 Ann. B. R. Intr. Mich. 13 W. Rot. 316. Ld. Raym. 772. S. C.]

\* [422] Plea of the ftatute of limitations o befavoured. Vide z Mod. 31, 89, 36, 37, 120, 127. 2 Saund. 220, 121, 125, 2 Mod. 72. Comberb. 70. 1 Show. 354. 2 Show.

INDEBITATUS assumpsit laid several ways; the defendant pleaded actio non, quia dicit quod billa predict. exhibit fuit 20 die Junii & non antea, & quod ipse ad aliquod tempus infra sex annos ante exhibitionem bille predict. Non as-268. 2 Mod. 71, sumpsit, &c. The plaintiff replied a bill of Middlesex, 311. 1 Vent 90. jumph., Con tested die Lune prox' post tres septimanas, &c. returnable the 127. 1 Saund. same day, whereupon was returned non est inventus, and continued down by vic. non mist breve & precept, sicut alias; to this it was \* demurred, and judgment given for the defendant; for there cannot be fuch a bill of Middefex as this, which is returnable the very day of the teste (a); and the statute of limitations, on which the 79, 126. 3 Salk. security of all men depends, is to be favoured. 227. Vide a Bl. Rep. 1131. 1 Bl.R. 236, 215. 2 Bur. 958.

(a) By the report in Ld. Raym. it sued out; but the contrary is ruled, feems that a bill of Middlejex cannot 4 T. R. 611. be returned the same day that it is

#### 7. Hunt versus Burn.

9. C. 2 Salk.

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[Hill. 1 Ann. B. R. Vide the State of this Cafe, tit. Fines. pl. 5. vol. 1. p. 339.]

formedon, may take advantage of a right of entry. 1 Lutw. 779- 1 Salk. 341. Lutw. 813.

H. berred of his I J PON the question in this case, whether it appeared by the verdict, that the iffue in tail was barred of his formedon by 21 Jac. 1.? the Court held, that the verdict was insussicient; and that it should have found that no formedon was brought, else the Court could not intend but that it was brought; for this is matter of bar, which should come on the defendant's part to shew; and this act is not penned as the statute de finibus: It is enough in that case to find a fine, and you need not find that the party claimed or entered not, for that comes in by way of proviso; but here it is part of the body of the act.

adly, They held, that supposing him barred of his formedon, yet he is not thereby hindered to pursue his right of entry, which accrued to him by the death of tenant for life; for this is a new right which he had not before: That where a man releases his right, he cannot pursue his action or remedy; but if a man has a right and several remedies, the discharge of one is not a discharge of the other, and that the statute of 4 H. 7. enures and operates

by way of bar to the right, which answers Saul and Clerk's case, Jones 210, 211. But the 21 H. 8. and the 21 Jac. 1. operate by way of bar to the remedy, and the word right there is right of entry (a).

- (a) This case was affirmed in Dom. Proc. 1 Brown P. C. 53:
- 8. Heyling versus Hoskins. Vide this Case, title Action sur le Case sur Assumpsit, pl. 19. vol. 1. p. 29.

#### Gould versus Johnson.

[Hill. I Ann. B. R. 2 Ld. Raym. 838. S. C. Pleadings and Record, 3 Ld. Raym. p. 7.]

ASSUMPSIT, That in consideration that the Where the duty plaintiff, at the defendant's request, would receive arises on consideration execu-A. and B. into his house ut hospites, and diet them, the tory, the dedefendant promised, &c. Non assumpsit infra sex annos was fendant must pleaded; the plaintiff demurred; and held no plea; for plead quod action non accrevit, &c. the defendant cannot in such case plead non affumpsit infra Vide ante, pl. 4. fex annos, but actio non accrevit infra fex annos; for it is 2 Show. 79, 126. not material when the promise was made, if the cause of 1 Mod. 71, 268, action be within the fix years; and the dieting might be 125. I Saund. long afterwards; and though it appears upon the face of 36, 37. I Ventable declaration, that the cause of action did not arise with 1 Lev. 298. S.C. in fix \* years; yet the defendant shall not take advantage Ante 25. of that, without pleading; because there might be an original sued out, which the plaintiff cannot otherwise shew
\$\$\frac{143}{89}\$. Holt 34.
\$\$\frac{143}{89}\$. Holt 34.
\$\$\frac{143}{89}\$. \$\$\frac{143} than by way of replication, upon the defendant's putting 2 Mod 311. him upon it.

1 Lev. 287, 298. 2 Mod. 312. 1 Vent. 89. 1 Sid. 465. Bur. 1281. 3 Atk. 71.

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#### 10. Reading versus Royston.

See Farell. 5 &

[Hill. 1 Ann. B. R. 2 Ld. Raym. 829. S. C.]

NE feised in fee, having iffue two daughters, devised Statute of limihis land to his grandfon by his eldest daughter, in fee; tations runs not against heirs, the eldest daughter being dead at the time of the devise: unless actually The grandson died without issue, and the heir of the grand-oussed or disseiffon being the heir on the part of the father, and the heir 242. Pre. Ch. of the other coparcener, entered into the land, and took 222. Vi. 5 Bur. the profit by moieties for twenty years together, thinking, 2064. Cowp. according to the opinion of Sir Matthew Hale in his younger 217. years, (who was their counsel,) that the devise was void . Vol. II.

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# Co. 93, 94. b. . And. 6 j. Owen 65.

for one moiety. Now the mistake being discovered, the Co. Lit. 163. b. heir of the grandson brought an ejectment against the heir of the other coparcener; and upon a special verdict found, it was objected in his behalf, that the device was void as to one moiety; but this being over-ruled, (quod vide title Discent, pl. 3. vol. 1. p. 242.) it was then objected, that the bringing of this ejectment against the heir of the other coparcener, for this moiety, admitted the plaintiff to be out of possession for twenty years, and then he was barred by the statute of limitations. Sed per Cur., The statute of limitations never runs against a man, but

ũn, F.

where he is actually outted or diffeifed; and true it is, one Ante 192. Co. tenant in common may disseise another; but then it must Lit. 199, 243. be done by actual differin, and not by bare perception of 3 Bl. Com. 170. profits only (a): but here the difficulty is not fo great: Com. Dig. Sci. profits only (a); but here the difficulty is not so great; there is no tenancy in common in this case, for the heir of the grandson had the whole by devise, and the other is a mere stranger; and where two men are in possession, the Tenants in com- law will adjudge it in him that hath the right. mon may be oy prescription, not may be tenant in common by prescription, yet he may not be tenant in common by wrong; nor can a man be diffeifed of an undivided moiety; therefore the bringing the ejectment admits nothing; for if a man be seised of the 2 Lev. 27. Can- whole, and makes a lease to another of a moiety undivided, not join in eject- and a stranger ousts the lessee, he must bring his ejectment 109. 5 Med 2:, of a moiety; and so if they be both ousled, they must 26, 27. Show. bring feveral ejectments.

by wrong. 2 Saund. 116. 1 Inft. 195, 196, 197, 198. ment. 1 Lev. 342.

(a) Per Ld. Mansfield, in Fisher v. Proffer, Coup. 218., The possession of one tenant in common, eo nomine, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant; nor indeed is refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant

of his moiety, the other refuses to pay, and denies his title, faying, he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough. And in the same case it was held, that a jury might presume actual ouster from an undisturbed and quiet possession for a great length of time, ff. 36 years. Vide Espinasse 456. 1 dik. 493. 1 Bl. Rep. 677. 2 Bl. Rep. 690. 1 Salk. 391.

S. C. 6 Mod. 240. Kep. A. Q. (11 Mod.) 38. \* [424]

Blackmore versus Tidderly. II.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1093. S. C.]

ill in trespass. 6 Mod. 5, 12, 59. Faien. 99.

Not guilty with-in fix years, is ill in trespass.

In trespass for affault and battery, the defendant plead-ed non culp. infra sex annes, by mistake, and not accord-Vide ante, pl. 3. ing to \* the flatute, which is but four years. The plaintiff demurred, and after argument it was adjudged an ill plea; for if it be confidered as at common law, there was no such plea; if on the statute, the act is not pursued, Vide sta. 4 Ann. and the plaintiff could not take issue on it, quod est culp. c. 16. 5. 12. infra sex annos is an issue immaterial; because it may be, the jury might find him not guilty infra quatuor annos, but guilty infra fex annos. Judgment for the plaintiff.

#### Hide versus Partridge.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1204. S. C.]

IBEL was for mariners' wages in the Admiralty Statute of limi-Court, and the defendant there pleaded the statute of tailons pleadable to a suit in the fimitations, viz. that no cause of action accrued within Admiralty for fix years prox' ante tempus mentionat. in libello; and it mariners wages. was over-ruled there. And now upon a motion for Quere. Suits for mariners wages. a prohibition it was urged, that mariners' wages were 1 Salk 31 to 35. fuable in the Admiralty by indulgence only, and not of 6 Moc. 11, 12, right; that at common law, the statute would be a good 548. Mod. Cases plea: On the other side it was said, the statute extended 424. S. C. only to courts at common law; that it was not pleadable 3 Salke. 227. Holt 428. Rep. to a proceeding in the Spiritual Court pro violenta manuum A. Q. 43. injectione super clericum: But a prohibition was denied, be- I Chan. Cases cause the statute was ill pleaded; but the plea was after- 152. 2 Chan-wards amended: And Holt, C. J. said, It was strange that 2 Saund. the same matter, well pleaded, should be a defence in one 124, 126. court, and not in another. The statute of limitations is a 3 Mod. 244. good plea in Chancery; it is true, it is no plea to a fuit 4 Mod. 105. pro violenta manuum, &c. but that is, because the proceed- 1 Sid. 465. ing is pro reformatione morum, and not for damages; and 1 Vent. 146, fo it is at common law, it is no plea to an indictment for winch. s. trespass, otherwise in an action. Adjournat. (a)

6 Mod. 238.

(a) By stat. 4 and 5 Ann. ch. 16. in fix years after the cause of acthese suits must be commenced with-

#### Matthews versus Phillips.

[Cite and agree Mich. 6 Ann. B. R.]

EBT was brought in the Palace Court, and after some Action removed proceedings there, the fix years expired; the dehybabeascorpus,
flatute of limitafendant sued a babeas corpus, and removed the cause into tions pleaded B. R., where the plaintiff declared de novo, and the de- above, plaintiff fendant pleaded, that the cause of action did not accrue may reply, the full below was within fix years before the teste of the babeas corpus; and within fix years. this was held to be a good plea, but that the plaintiff See 2 Show. 79, might reply the fuit below, and shew that to have been 126. I Sid. 223.

within the fix years; not that this suit was a continuance 5 Mod. 426. of the fuit below, but that the plaintiff had rightfully and i Mod. 89. legally pursued his right; and it should not be in the power Lutw, 258, 263,

265. 2 Lord

of the defendant to defeat or hinder him of a remedy, S.P. 25tr. 719. without any default; as where one brings an action be-Buil. N. P. 151. forc the expiration of fix years, and dies before judgment, Fitzg. 170, 289. the fix years being then expired, this shall not prevent his executor \*.

 Nota. In debt upon an award, the statute of limitations is no plea, 2 Saund. 65, 67. Nor in a writ de rationabili parte bonorum. Hutt. 109. Nor in an action on the case for conspiring to indict, &c. Cro. Car. 163. Nor in debt for an escape. 1 Saund. 37. 1 Sid. 305. Quære, Nor in case for money levied on a fieri facias by the sheriff, 1 Mod. 245. Nor to an action for a false return of rescous. Smith versus Robinson, in C. B. Trin. 8 W. 3. rotulo 1819. This note is copied from the MS. Reports of Judge Blencowe. - For a further enumeration of excepted cases, vide Com. Dig. Temps. G. 9. 6th vol. 3d edit. pa. 339.

#### Moor 576. 5 Mod. 75, 93, 160, 440. 6 Mod. 69, 123, 244. 177. Hard. 56, 210. Cart. 68, 114, &c. S C. I Salk. 76. Vide pott.

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# see 3 Lev. 264. London, and the Customs thereof.

1. Arnot versus Brown. [Mich. 7 W. 3. B. R.]

Court of Aldermeh's power 1 Sid. 167. Poph. 170. Raym. 87. 1 Mod. 55.

ARNOT and Brown were owners of two contiguous houses. Brown had lights in his house towards Arconcerning new not's yard, and Arnot made up blinds. The Court of Al-19 Car. 2. c. 3. dermen, upon 19 Cor. 2. c. 3., ordered they should be was only during abated; but a prohibition was granted in B. R.; for the rebuilding of the city. Stopping lights, see tat, where they have power to determine real actions; it is plain that the Court of Aldermen have no power in this 9 Co. 58. Hob. furnmary way, unless by 19 Car. 2. c. 3., and that gave 131. Hutt. 136. them only a temporary power during the rebuilding of the 1 Lev. 239,248. city. While the city was rebuilding they had power to assign lights; but by being once assigned, the party gained a Lev. 193. a legal title to them, and the court of the Mod. 166,193, have no farther power. Vide Residuum, 6 Mod. 244. a legal title to them, and may maintain an action at common law for the obstruction, and the Court of Aldermen

#### Domina Regina versus Rogers.

[Trin. 1 Ann. B. R. 2 Ld, Raym. 777. S. C.]

PON a certiorari, the custom of London was return- Custom to pued, viz. That if any citizen speaks contemptuous nish by informawords of an alderman, or affaults him in the execution of tion in the Court his office, an information shall be exhibited against him in affault and conthe name of the common serjeant in the Court of Aldermen, temptuous words and that they should proceed against him to fine him; and of an alderman that, at a wardmote held by Sir Robert Jeffreys, the defend- his office, is ant affaulted him, and said, I have as much to do here as good. Other-you; you think fure you are among your Bridewell birds, but wise, if to dis-you are mistaken; for which an information was exhibited by the common serjeant. Et per Cur. It had been doubt-Post 697 3 Cro. ful if the offence had been by words only, because no in-78. I Vent. 16. dictment lay at common law, but he is to be bound to 1 Sid. 65. good behaviour; yet for assault he is punishable, and that I Mod. 35 may be by information there by the cnstom, as well as in 133. Faresti 28.

B. R. by the course of the Court, though the regular 6 wood. 124. course at common law is by indictment. 2dly, The Court 4 Mod. 341, 2. held, that the information lay in the Court of Aldermen, 327. 3 Keb. though an alderman was grieved; otherwise of the mayor, 764, 714, 799, for he is an integral part, without which the court cannot 594 2 Lev. 200, be held, but the other may be severed, and he must not 1 Vent. 16, 327. fit; fo the mayor and aldermen may grant to an alderman, <sup>2</sup> Jo. <sup>229</sup>. but the aldermen and city cannot grant to the mayor: But <sup>2</sup> Cro. <sup>58</sup>. Hob. <sup>62</sup>. <sup>8</sup> Co. <sup>116</sup>. the Court held, that a custom to disfranchise for contemp3 Cro. 73.

tuous words spoken of an alderman, was void, according Sheph. Abr.
436. Lev. 398. to 2 Lev. 200.

S. C. Farefl. 28. See 1 Mod. 35. & prox. pag. 5 Mod. 75, 54, 440. 2 Lcv. 200. 6 Med. 124. Holt 331.

[ 426 ] Corporations 13, 24.

#### Custom of LONDON concerning Orphans and Vide Com. Dig. Freemen's Estates.

If a freeman of London has no wife, but has children, See 1 Cro. 347. the half of his personal estate belongs to his children, and I Lev. 227.
the other half the freeman may dispose of; so if the freeI Keb. 868. man has a wife and no children, half of his personal estate 2 Lev. 32, 130, belongs to his wife, and the other half he may dispose it Mod. 77, 78, cf (a). But if a freeman hath a wife and children, one 174, 409, 407. third part belongs to the wife, and another third part to a Chan Chan the children, and the freeman may dispose of the other 170, 101 third part. And if such freeman dies intestate, the custom 199, 285, 310. affects only two thirds, and the remaining third is subject Ven. 134, e.m. to the statute of distributions, and so dividing the whole 465. Skin. 25,

vol. 4. 3d edit. pa. 234.

into ninths, four ninths belong to the wife, and five ninths

belong to the children.

Cuftom extends on!y to children, not grandchil-

If a freeman of London has two fons, and the eldest fon dies leaving a fon, and then the freeman dies, the grandchild, though in law a representative of the son, who never was advanced, has no part by the custom; for the custom of London extends only to the children, and not to the grandchildren; per Northey; and so it has been certified by the recorder into Chancery.

Hotchpot extends only amongst children. Vern. 397. 2 Wms. 526.

If a freeman of London has but one child, and he has received some portion from his father, and the father dies, leaving this child and a wife, the child shall have his full orphan's part, without any regard to what he has already received; for that advancement in part is only to be brought into hotchpot with children, and not with others. Per Sir

Edward Northey.

Where it appears under the father's hand how much a child has rewill judge whether full advancement, or not, Vern. 89, 216. Vide act of parliament 11 Geo. 1., by which power is given to freemen

If a freeman of London has advanced any of his children with a portion; yet if it appears what that portion was by any writing under the father's hand, or by the father's will, ceived, the Court or his marriage-settlement, and by the said will or settlement it is faid, that the faid portion is or was in full of his child's part by the custom; yet this child shall come in for the cultomary \* part of the rest of the father's personal estate, bringing the portion already received into hotchpot; otherwise it is, if it does not appear under the father's hand what the advancement was.

to dispose of personal estates by will.

Vide 4 Co. 124, &c. 6 Co. 69. 8 Ca. 170. 9 Ca.

## Lunatic, Ideot.

Hard's Case.

[Mich. 8 Will. 3. B. R.]

the father is set tled, not where

Maintainable by SIR Bartholomew Shower moved to quash an order of the parish where justices, for removing an ideot to the place of the las legal fettlement of his father, comparing it to the case o born. Vide post. a bastard, who is to be maintained by the parish where he 528, 485. pl. 43 is born. Sed per Holt, C. J. The father of an ideot ough 381. Mod. Cafes to maintain him, and if he cannot, the parish or plac where his father is settled. There is a where his father is fettled. There is no difference between an ideot and any other poor child. The case of a bastar

differs, for the reason of that is, because he has no father, or rather none that the law looks upon as such; and therefore, till 18 Eliz. c. 3., the parishes where they were born were bound to maintain them. Adjournat.

## Thompson versus Leach.

S. C. post. 565, 576, 675.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45.

Tenant for life, being non compos, with remainder to His deed is void. his first fon in tail, remainder to B. in fee, surren- Vide Lutw. dered by deed of furrender to B. before he had a fon; 1188. S. C. Eq. this deed of furrender was held absolutely void and the this deed of furrender was held absolutely void, and the 3 D. 164. p. 13. contingent remainder not destroyed.

3 Salk. 300. 1 Show. 296.

Cafes B. R. 175. 3 Mod. 296, 301. 3 Lev. 284. Cafes in Parl. 150. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Fearne 467, (243).

## Mandamus.

[428] Vide 1 Lev. 23, 65, 75, 91, 119, 123, 148, 187, 162. 2 Lev. 14, 18, 238. 3 Lev. 309. 1 Mod. 82. 3 Mod. 265, 332, &c. 4 Mod. 233, 234, 260, 281, 368. See

#### Anonymous.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 125., by the pag. 430. pl. 8. name of Green v. Pope.]

I N an action on the case in the Common Pleas, for a false No peremptory return of a mandamus, judgment was given for the an action for a plaintiff upon demurrer; and now Serjeant Pemberton salse return came into B. R. and prayed a peremptory mandamus; but it was denied; for per Holt, C. J. Every mandamus recites the fact, prout constant nobis per recordum. How can we fay 400, 419. Holt that, in this case, we cannot take notice of the mandamus. that, in this case, we cannot take notice of the records of 438. the Common Pleas? You might have brought your action here.

#### Dominus Rex versus The Mayor and Burgesses of Wilton.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 225., by the name of Rex v. Chalke.]

Want of fummons is no objection, if the person appeared and was heard. Vide post. 435. S. C. 5 Mod. 255, 257. Bur. 731.

A Mandamus issued to restore Elias Chalk to the place of a burgess of Wilton, to which was returned a custom for the mayor and burgeffes to remove for misbehaviour: They then set forth several instances of misbehaviour; and that he being thereupon fully heard to all that was objected in the common council of the mayor and burgeffes, and it being fully proved upon him, they turned him out. It was objected, that it was not faid he was summoned. Vide Style 51, 446, 452. 3 Bulft. 189. 2 Keb. 489. Per Cur. The end of the fummons is, that he may be heard for himfelf, and therefore where he has been heard, want of fummons is no objection; but this was afterwards determined on other objections.

Vide 4 Mod. 233, &c.

3. Dominus Rex versus The Mayor, &c. of Oxon.

[Mich. 8 Will. 3. B. R.]

Where an officer A Mandamus issued to the mayor and commonalty of Oxtory mandamus

**\*** [ 429 ]

ford to restore Slatford to the office of town-clerk; ed, and the corperstion does not they returned their charter of incorporation, which gives rely upon their them power to choose a discreet person to be town-clerk, power, but return to hold at the will of the mayor and aldermen: the 13 a midemeanor, Car. 2. flat. 2., and the stat. of W. & M. about taking ficient, peremp- the oaths, and that the office of town-clerk being \* void, they chose Slatford, and that he took the oaths of office coram nobis majore & ballivis; but did not coram nobis majore & ballivis take the oath of allegiance, per quod his office became void, & ea ratione, &c. Upon which these three

ist, Whether the party that comes in is to take the oaths at his peril, or they are to tender them, and if he re-2 Show. 68, 475. fused, whether it must not appear upon the return? Et per Cur. He must take them at his peril; the magistrate need not tender to him, but he must tender himself to the magistrate, and demand them; and if it be refused, must fue a mandamus, and the magistrate is punishable (a); if the law were otherwise, it would be in the power of the magistrate to clude the act in favour of the party.

points were stirred and settled:

3 Vent. 82. VideRaym 212. 2 Saund. 289. 4 Mod. 233, 237, 239. 5 Mod. 432, 433, &c. 3 Mcd. 72, 118. Post. 432.

> (a) If he does not tender them ex eff.cio. Per Holt. Cumb. 419. 2dly, Whether

adly, Whether it be enough to fay, he did not take the oaths before them? And this was held naught; for two justices have a power to administer the oath, and he might take the oath before them.

adly, Whether a person, that was only tenant at will should have a peremptory mandamus? Et per Cur, We do not determine whether there ought to be a good cause, or not, for fuch removal; but suppose it may be without cause, yet still they must determine their will: Now they do not return a determination of his office by their will, as the reason why they do not admit him, but the special matter of his not taking the oaths; therefore, fince his of- Str. 674fice continues, and this excuse is insufficient, he ought to be restored. A peremptory mandamus was granted. Vide Serjeant Whitacre's case.

## The Mayor of Coventry's Cafe.

[Hill. 9 Will. 3. B. R.]

A Motion was made for an attachment, for not returning The first write an alias mandamus. Et per Holt, C. J. In case of a ought to be returned. Mod. mandamus out of Chancery, no attachment lies till the plu-Cases as. Post. ries, for that is in the nature of an action to recover da- 434. Skin. 669. mages for the delay; but upon a mandamus out of this Pal. 455. court, the first writ ought to be returned (a); yet an attachment is never granted without a peremptory rule to return the writ, and then an attachment goes for the contempt; and in this case a peremptory rule was made.

- (a) This is expressly required by stat. 9 Ann. ch. 20. s. 1. 11 G. 1. ch. 4. s. 9.
- Dominus Rex versus The Mayor, &c. of [430] Coventry.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 391. S. C.]

MANDAMUS to restore J. S. to be one of the Custom to recommon-council house; the defendants returned, move ad libitum, good, but that that they were an ancient corporation, and that the king must be returned by his letters patent, reciting their customs, amongst positively. See council house, and removing them ad libitum, did grant 259, 431, &c. and confirm all their liberties, customs, &c.; and that they Raym. 236, 439-by force of the said custom time out of mind used, & see I Vent. 143. eundum formam literarum patentium pradict. did remove 2 Keb. 770,796. him: And first, it was agreed, that the estate, whether by cultom or charter, has this condition annexed to it, that

the corporation might displace him at will, without asfigning any cause; but this differed from the case of the recorder of Bath, who was appointed by the commissioners for regulating corporations: By their custom they were to choose one learned in the law for a recorder; the corporation turned out the Lord H., and returned, he was not learned in the law: and held good; for whoever put him in, he must be so qualified by the custom, and he might bring an action for a false return, if he be a person ' learned in the laws. 2dly, This return was held naught, because it did not appear that the corporation had any such power, but only by the recital; whereas they should have returned, they had such a power positively (a).

(a) In Ld. Bruce's case, 2 Str. 819. the Court says, The modern opinion has been, that a power of amotion is incident to the corporation. The same doctrine is recognized in the King and Richardson, 1 Bur. 517., and in the King v. Lyme Regis, Doug. 148.; it was ruled accordingly, that it

was not necessary to allege in the return to a mandamus, that the corporation at large had a power of amotion. It should, however, be observed, that those cases related to removals for corporate offences, and not to removals ad libitum.

#### Anonymous.

[Hill. 10 Will. 3. B. R.]

Rule to inspect the charter, in order to make return, denied, before an action on the case brought.

Mandamus was granted to admit J. S. mayor. It was moved, that the mayor in possession might have a rule to see the charter, that he might be able to make a return; for the other who had fued the mandamus, was not rightly elected: But it was denied, for he may return that; and in an action for a false return, shall have a rule to fee the charter and take a copy; and it was faid, that the Court were always upon that difference (b).

(b) On a rule to shew cause why there should not be an information in the Vide Rex v. Hostmen of Newcastle, nature of a quo warranto, the Court Str. 1223 Rex v. Purnell, 1 Wilf. made a rule for the defendant to inspect the charter and corporation books.

Rex v. Hollister, Rep. Temp. Hard. 245. 329. Rex v. Bridgeman, Str. 1203.

See pag. 428. pl. 1. 4 Mod. 34, 233, 236, 368. Raym.

After the return falfified, peremp-

#### Buckley versus Palmer.

[Trin. 11 Will. 3. B. R.]

A N action was brought for a falle return, and a verdict was for the plaintiff, and a peremptory mandamus is of right. See was moved for, and opposed, because it was a hard verdict, &c. Et per Holt, C. J. When an action is brought for a

false return, and that is falsified, we cannot refuse a Information for peremptory mandamus. Sed nota; This motion cannot be afalte return, &c. Comber, 400. made till four days are past after the return of the postea; S. C. Holt 440. because the defendant has so long to move in arrest of See 1 Salk. 77, judgment. Pass. 12 W. 3. B. R. The case of the city 78. Skin. 67, Str. 983. Str. 697. Vide st.

697. 9 Ann. t. 20. Com. Mandanus, D. 6. 5th vol. 3d ed pa 38.

Dominus Rex versus The Bailiss and Burgesses of Malden.

[Trin. 11 W. 3. B. R. 1 Ld. Raym. 481. S. C.]

Mandamus issued, reciting quod cum they ought to Where the rechoose yearly two bailiffs, out of such as had not turn speaks of a been bailiffs for three years before, ideo they were commanded to choose. They returned their constitution by writ, it ought letters patent to be, to choose two ex aldermannis, and that to deny the supthey had chosen two fecundum formam & effectum litera- posal of the writ. rum patentium generally; and this was held naught, for 136, 233. Postthey ought to deny their conflictation to be as is mentioned pl. 16. Cro.
in the write or show a compliance with the in the writ, or shew a compliance with the writ; whereas they have acted according to a constitution set forth in the return different from the writ, and do not deny the supposal of the writ; wherefore a peremptory mandamus was granted.

Dominus Rex versus The Mayor, &c. S. C. post. 432, of Ahingdon. Cales B.R. 401.

[Mich. 11 Will. 3. B. R.]

Mandamus was granted to the mayor, bailiffs, and Mandamus Mandamus was granted to the mayor, bailins, and directed to the burgesses of the town of Abingdon: The mayor mayor, bailiffs, made a return and brought it into the crown-office, in- &c. Mayor tending to move to have it filed; and now a motion was alone may make made to ftay the filing of it, upon fuggestion, that this the return, and theothers cannot the others cannot be made by the manual and the others cannot be the others. return was made by the mayor and minor part of the difavow; but he bailiss and burgesses, and against the consent of the greater is punishable, if number, who would have obeyed the writ; and therefore fent of the mathey prayed they might disavow this return and put in jority. Vide another. Et per Holt, C. J. Where a writ is directed to post. 479, 699, 701. Carth. a single officer, as a sheriff, and a return is made by a 499, 500. franger, without his privity, he may any time that term Comber. 41, wherein the writ is returned, come in and disavow it, but 13. Rep. B.R. not after the term. Dy. 182. But in this case, where Temp. Hard. the writ is directed to several, and the mayor, who is the 188. most principal and proper person, returns and brings in the writ, it is not fit that we should examine upon affidavits.

#### Mandamus.

davits, whether there was the consent of the majority. We will take it, and leave you to to punish the mayor for this misdemeanor, if he be guilty; for it is a great crime, which will not only merit a heavy fine, but a peremptory mandamus will be granted, if the return be falufied. If they were all equal parties, this might be another case: The return was filed, and at the same time leave was given to file an information against the mayor.

[432]

#### Dominus Rex versus The Mayor, &c. 10. of Norwich.

[Hill. 11 Will. 3. B. R.]

Holt 444.

S. C. post. 436. A Mandamus was granted to the mayor, &c. of Nor-wich; it was moved, that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for Carth. 500, 501. returning an excuse, &c.; and they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation: Sed non allocatur; for he is the head and

Vide 2 Bur. 798. principal, and take your course against him (a).

(a) Which may be by way of information, prout supra.

S. C. ante 431. Poit. 699.

#### Dominus Rex versus The Mayor, &c. of Abingdon.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

Return, that A. was elected a burgels, but did not receive the facrament withper quod the election was void, and he is not a burgefs, ill. Ante 428, 429. 4 Mod. 233. 5 Mod. 432, 433, &c. 2 Show. 68, 289.

A Mandamus was directed majori ballivis & omnibus princi-palibus burgensibus burgi de A. (except R. and S.), setting forth the constitution, and that R. and S. were capital burgeffes, chosen by the commonalty to stand and serve for mayor in a year before, for the ensuing year; and that they were to choose one of them, ideo they were commanded to elect one of them accordingly. They returned the statute 13 Car. 2. seff. 2. c. 1., and that within twenty years, prox. post 25 March 1663. R. & S. fuerunt electi burgenses principales, and within a 3 Mod. 72, 1:8. year before their election had not received the facrament, per quod electio eorum vacua devenit & non sunt principales burgenses; and this return was held naught: 1st, The 475. 2 Saund. Court considered it without the last words, et non, &c. And as to that the Chief Justice said, the writ supposes them to be burgesses, and so the Court must intend them; and this is not answered by the special matter of the return. which shews only that he was once elected, and that was a void election; whereas he might qualify himself and be chosen again; and here is nothing to exclude the intendment of a subsequent election, which is according to the supposal of the writ.

2dly, The

adly, The Court considered it with the last words, and Return must be held the et non funt principal. burgenses, &c. to be only part certain to every intent. Vide of the conclusion or inference; and the Chief Justice said, ante 430. pl. 5. the law requires the most exact certainty in these cases, ecc. ib. post. because the party cannot traverse nor interplead (a); and 436, 586, 589, Mod. Casts 89. it is not enough to offer a matter, so that the party may be able to falfify it in an action; but the matter must be so alleged, that the Court may be able to judge of it and determine, whether it be a sufficient cause, or not. If the matter fet forth in this return had been fo alleged in a plea. in bar, the plaintiff might have replied a subsequent election: Ergo this return is uncertain, for there might have been a subsequent election.

[433]

(a) By stat. 9 Ann. ch. 20., the perfons suing the mandamus may plead to, or traverse all or any of, the material facts contained in the return; to which the persons making the return may plead, take issue, or demur. In Rex v. Lyme Regis, Doug. 148. Lord Mansfield says, he takes it to be settled, that the same certainty is required now as before that statute; though at first it Rex v. Bailiffs of Morpeth, 1 Str. 58.

might have been otherwise determined, because the reason was not the same. Buller, J. said, that a certainty to a certain intent in general is all that is requifite; which means what, upon a fair and reasonable construction, may be called certain, without recurring to poffible facts which do not appear. Viae Rex v. Mayor of Liverpool, 2 Bur. 731.

#### 12. Dominus Rex versus The Mayor, &c. of Rippon.

[Pal. 12 Will. 3. B. R. 1 Ld. Raym. 563. S. C.]

MANDAMUS was directed to the mayor, alder- Return of a remen, and commonalty of Rippon, to restore Sir Jo- fignation in the corporate assemnathan Jennings to his place of alderman of Rippon; they by and election returned themselves to be incorporated by another name, of another into soiz. mayor, burgesies, and commonalty; and farther, that i Vent. 19. Sir Jonathan Jennings, at such a time, at an assembly of i Lev. 148. the corporation, came & personaliter libere & debito modo re- 2 Show. 66. fignavit his office, declaring he would continue to ferve no 1 Sid. 14. longer in that office; whereupon they chose another in his room: And this declaration in a corporate affembly was held good, especially since the corporation accepted it, and chose another in his place; but till such election he had power to waive his refignation, not afterwards (b); and whether a deed was necessary, or not necessary, is not material, because they have positively returned quod resigmavit, which is false, if a deed was necessary, and there was none. Also the Court held the writ naught, because Carth 502. Post. at was directed to the corporation by a wrong name; but 700. Sir. 55.

(b) Vide Rex v. Mayor, &c. of Cambridge, Cowp. 532.

refused

refused to grant a new writ of mandamus, because an action lay against the particular persons for the false return of this: Ergo a new one would be vexatious.

#### 12. The Case of Andover.

[Mich. 12 Will. 3. B. R.]

FIVE persons cannot have one writ of mandamus to be Several persons campet join in a restored; for though the end of the writ is to do jusmandamus to tice, yet the foundation is the wrong in turning them out, seftore. See 5 Mod. 10, 11. and the turning out of one is not the turning out of another; nor can several persons join in an action on the 43, 67, 436. Comber. 307, 308. 6 Mod. 18. case for a false return. Per Holt, C. J.

I Shower 258, 260, 281, 364. Far. 83. S. C. Holt 441. 1 Bl. Rep. 60. Str. 578.

#### Domina Regina versus Twitty and 14. Maddicot.

[Mich. 1 Ann. B. R.]

\*[434] Non fuit cebico modo elect. not a good answer, unless the writ luggefts, debi.o modo. S. C. Far. 83. Holt 442. 5 Mod. 10, 11. 12 Mod. 2. Carth. 170. Doug. 79. Com. 5 vol. 3d edit. and evalive. Pa. 37.

MANDAMUS to Swear A. and B. churchwardens, fuggesting that they were debito modo electi: The return was, quod A. & B. von electi fuerunt debito mado. It was objected, that it ought not to be debite modo; and it ought to be in the disjunctive, nec corum alter elect. fuit. Sed per \* Holt, C. J. it was resolved, 1st, That one cannot be sworn upon this writ; for either both were chosen, or the writ is misconceived (a). 2dly, Where the writ is to Ld. Raym. 1379, swear one debito modo electus, quod non fuit debito modo elect., 1405. 2 Bur. 225. is a good return, for it is an answer to the writ; but where it is to fwear one electus churchwarden, there qued non fuit Mandamus D. c. debito modo elect. is naught, because it is out of the writ,

(a) R. contr. 2 Ld. Raym. 1008.

Q. 6 Mod. 25.

15. Anonymous.

[Mich. 4 Ann. B. R.]

between the tette and return A real the composition and this term, viz. That if the corporation to which the mandamus is fent be and return. A - te 429. Pal. 455. above forty miles from London, then there shall be sisteen (b) days between the teste and the return of the first writ

(b) The rule here meant was pro- Jur. de Dover, Str. 407. It appeared duced in the case of Rex v. Maj. et to be fourteen, and not fifteen days, as of mandamus; but if but forty miles, or under, but eight days only: And as to the alias and pluries, they made no rule, but would consider of that, and that the writ should not be tested before it was granted by the Court; so that the alias and pluries may be made returnable immediate, as they used to be: Also the Court said, that at the return of the pluries, if no return was made, and there was an affidavit of the service, there should go an attachment without hearing counsel to excuse the contempt.

here stated. minus: Accordingly it was ruled so that a writ tofted the 14th may be in the said case in Str., that fourteen returnable the 28th. days was the proper time; the one

It had the words ad to be inclusive, and the other exclusive;

#### 16. Domina Regina versus The Bailiss, &c. of Ipswich.

[Serjeant Whitacre's Case, Hill. 4 Ann. B. R. 2 Ld. Raym. 1233. S. C.]

A Mandamus was directed ballivis, burgenfibus, & com- Variance bemunitat. villa de Gippo, to restore Serjeant Whitacre tween the writ to the office of recordership; the return was, responsio ballivorum, burgensium, & commun. villa de Gipwico, sive burgi poration. Vide Gipwici patet, &c. nos ballivi, &c., return the constitution post. 452, 658, & ante pl. 8. fo and fo; and that the recorder is amoveable pro male- 1 Salk. 145, gesturis per ballivos & burgenses vel major. partem corum quo- 146, 151. 1 Sid. rum ballivos dues esse volumus: Then they shew Serjeant 64- Hard. 97.

1 Lev. 50. S.C.

Whitacre chosen to continue ad libitum, and that at such a Rep. A. Q. 67. fessions of the peace the serjeant had notice, but did not Holt 443, 445, attend; and that having notice to answer, he appeared Mod. Cases 128. and answered, and by the bailiffs, burgesses, and commonalty, (the bailiffs being then present,) he was turned out of his faid office. Et ulterius certificamus quod inhabitantes ville pradict. nunquam nuncupati fuerunt per nomen ballivorum, burgens., & com. villa de Gippo, &c. This case pended long, and was often argued upon several objections; and, 1st, The Chief Justice held, that Gippus and Gipwicus were different names, so that the writ was misdirected; but then they should have returned the special matter accordingly, and relied upon it; for that now they had admitted themselves to be the corporation to whom the writ was directed, by returning executio, &c. And a corporation may have several names; and here it being started, Whether a corporation should lose its old name by a new charter? the Chief Justice said, It would, where the new charter altered the very constitution in the integral parts of it; as if bailiffs and burgeffes are made mayor and alder-

and return in the

[ 435 ]

Hard. 504.

z Sid. 461. 2 Cro. 5.0. Raym. 188. # Lev. 14%. # Vent. 82-

Str. 261.

A motion must charged.

Ante 429-

men, or mayor and burgesses, or where an abbot and convent are translated into a dean and chapter; but if the bailiffs and burgesses villa de Gippo accept a charter, constituting them bailiffs and burgeffes villa Gipwici, and giving them farther privileges, and that they shall be so called: this is a new name only, for the old corporation remains in the integral parts of it. Powell being not fatisfied in the first point, it vanished without resolution, by discovering that Gippo in the latter end of the return was with a dash, and in the writ without, so that then it was not ad idem. 2dly, The whole Court held, that though the bailiffs were only said to be present, they should be intended to be confenting, either actually, or as included in the Non-attendance major part. 3dly, That the recorder (a) is bound to attend a good cause of and assist at the sessions to direct the corporation in the office of recorder. proceedings of justice, and that his office being a public Bur. 1999. De- office relating to justice, non-attendance is a good cause of fect or notice is forseiture. 4thly, Though the summons or notice Serance. Ante 428, jeant Whitacre had to answer this charge set no time when he should appear, yet his appearing and answering cured the defect of notice in the time, and would have cured want of notice of the charge. Palm. 453. For though a man ought to be prepared, and have convenient time for that, yet he may waive this benefit if he will; but in this be for the matter case, his notice was to answer his non-attendance at a selfions of oyer and terminer, and therewith he was charged; whereas he is turned out for non-attendance at a fellions of peace, and indeed answered to that, though not charged therewith; which the Court held incurable and fatal, and ordered a peremptory mandamus, and that it should be directed according to the first writ, viz. Ville de Gippo, and must not differ; and though Mr. Raymond objected to a peremptory writ, because he was only recorder ad libitum, (1 Sid. 14.) non allocatur; for the corporation have not returned that; they have relied upon his misdemeanors. and not upon their power.

was held, that a general neglect or refusal to attend the duty of a recorder is a reason of sorfeiture; a determined

(a) In the case of the King v. the neglect, a wilful refusal. But it is Corporation of Wells, 4 Bur. 1999., it otherwise with respect to a single instance of omitting to attend, when no particular bufiness was expected, nor in fact happened.

#### Domina Regina versus The Mayor and Aldermen of Norwich.

[Paf. j. Ann. B. R. 2 Ld. Raym. 1244. S. C.]

MANDAMUS to admit Dunch to be an alderman Several matters of Norwich; they returned the charter of E. 4. may be returned, Quod aldermani onerentur & exonerentur prout in London.; confifeat. Vide and that in London, if a person be elected alderman by the post. 586, 589, ward, the Court of aldermen may resuse him; and that D. 1 Show. 280. ward, the Court of aldermen may refute thin; and that 2.

Was elected by the ward, but refused by the mayor and alLutw. 130. dermen, because he had not received the sacrament infra Mod. Cases 211. annum tunc prox. antecedent. electionem fuam; and that he 3 Mod. 114. was turbulent and factious, and procured his election by Holt 444. bribery; et quod non fuit electus. The Court agreed that feveral causes might be returned, and that either, not qualified, or not elected, had been a good return; but the Chief Justice questioned whether bribery would vacate the election, because it did not appear to be an office concerning the administration of justice, and within the statute Also the whole Court agreed, that as foon as D. Election in one was chose by the ward, it was an election, and that the body; approaldermen did not choose, (having but one person sent ther, them,) but approve; and that before approbation, the election was complete; as a presentation is before the bishop approves a clerk; or as a nomination is a perfect nomination before the other presents. It follows then, that this return is repugnant, and the Court cannot tell what to believe; for at first they admit an election, and avoid it; and yet at last they return, there was no election at all. A peremptory mandamus was granted (a).

(a) Return that the person was not elected; and also that it was neceffary for persons elected to be approved by the lord of the manor, which he was not, is good and con-Eftent, Wright v. Fawcett, 4 Bur. 2041. So a return that the party was not duly elected, and that there was a eukom to remove ad libitum, according to which he was removed; for he might be in possession de facto, and tither ground would justify his re-

moval, Rex v. Churchwardens of Tauxton, Cowp. 413. Where two causes returned are inconsistent, the whole must be quashed; because the Court cannot know which to believe; and it is an objection to the whole return. But if, of causes not inconsistent, some are good and others are bad, the Court may quash the bad, and send the good to trial, Rex v. the Mayor of Cambridge, 2 T. R. 456. · Vide Rex v. the Mayor of York, 5 T. R. 66.

# 18. Domina Regina versus The Mayor, &c. of

[Mich. 6 Ann. B. R.]

Writ to one to commend another to do the 493. pl. 60.

ANDAMUS to the mayor, aldermen, and capital burgesses of Derby, viz. Whereas A. and B., &c. removed the party complaining from his office of burgefs, post. 489-pl. 51. commanding them to command A. and B. to restore him, was quashed; for it is absurd that the writ should be directed to one person to command another.

Vide ante 433. pl. 13.

#### 19. Anonymous.

Several ought not to join in a writ to be reftor-5 Mod. 10, 11. Ante 433 pl. 13. 2 Saund. 116. 1 Vent. 167. 1 Lev. 109. Str. 578.

A Mandamus went to restore nine persons to the place and office of common council-men; the constitution ed. a Lev. 27, was returned, and that there must were more as a lev. 27. C. J. The writ ought to be quashed; there ought not to be See 1 Sid. 209. nine persons in one writ; the amotion of one is not the was returned, and that these nine were debite amoti. Holt, nine persons in one writ; the amotion of one is not the amotion of another; their interests are several, and they may have been removed for several different causes; one for one fault, and another for another. How can we grant a joint restitution to them? Eyre was of the same opinion.

437 See 3 Lev. 364,-376, 411.

## Marriages.

1 Show, 50. S.C. Comb. 131.

#### Alleyne & Ux. versus Grey. ı.

[Trin. 1 W. & M. B. R.]

In debt by baron I N debt on a bond, the defendant pleaded ne unques accouple in loyal matrimony; plaintiff demurred, and had is no plea. Doct. judgment, for it alters the trial; instead of trying per pais, placit. 378. See it puts the trial on a certificate from the ordinary; and, 1 Lev. 41. 1 Sid.

23, 64, 387.

2dly, It admits a marriage, but denies the legality of it;
2Rol. Abr. 551. whereas a marriage de facto is sufficient, and, whether lepl. 1. 1 Keb. 41. gal or not legal, is nowife material. Andrews 227.

## 2. Jesson versus Collins.

6 Mod. 155. S.C. Holt 158.

[Paf. 2 Ann. B. R.]

M. King moved for a prohibition to stay a suit in the Contract per Spiritual Court, upon a contract of marriage per verba de præfeati, or de futuro, equally per verba de future, for which, if not performed, the party cognisable in the had remedy at common law. Holt, C. J. faid, that though and their fenit were per verba de futuro, yet it was a matrimonial mat- tence binding. ter, and the Spiritual Court had jurisdiction; and this was Vide 3 Mod. ter, and the Spiritual Court nad jurisdiction; and this was the great objection against actions at law, when first 411. 2 Lev. 15, brought up in these cases; but in answer to this it was 16.6 Mod. 1557 by betaking himself to damages for the breach: Also he 3 Lev. 65.

1 Salk. 24, 25.

2 Lev. 65. faid, that a contract per verba de presenti, was a marriage, 3 Lev. 65. Vi. viz. I marry you? You and I are man and wife; and this is Lutw. 68,78,79. not releasable: Per verba de futuro; I will marry you. promise to marry you, &c., which do not intimate an actual marriage, but refer it to a future act; and this is releafable; and as it is releasable, the party may admit the breach and demand satisfaction. He also said, he remembered this case upon evidence; assumpsit, in consideration that the plaintiff promised to marry the defendant, the defendant promised to marry him; upon evidence it was proved, that there was a promise; yet the desendant producing a sentence in the Spiritual Court, in disaffirmance of that contract, it was held good counter-evidence, and See 2 Lev. 15, the plaintiff was nonfuit. A prohibition was denied.

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16. acc. Str.961.

## Wigmore's Case.

See 6 Mod. 155,

[Mich. 5 Ann. B. R.]

THE wife fued in the Spiritual Court for alimony. In Contract per fact, the husband was an Anabaptist, and had a licence fent is a mar-fent the bishop to marry, but married this woman acting age. 3 LV-4 Coding to the forms of their own religion. Et per Holt, 411. 5 Mod. C. J. By the canon law, a contract per verba de presenti, is Swind. de Sponsilib. Cro. a marriage: As, I take you to be my wife: So it is of a con-El. 79. Holt trad per verba de futuro, viz. I will take, &c. If the con- 459. S. C. trad be executed, and he does take her, it is a marriage, and they cannot punish for fornication. Upon a prohibition to the Spiritual Court of Peterborough (a).

(e) By stat. 26 G. 2. ch. 33. s. 1. ther by verba de præsenti, or verba in marinages must be celebrated according to the rules of the church of Engind. Sec. 13. No suit shall be had in
the Spiritual Court to compel a marina had found to compel a marina had sec. 13. riage by reason of any contract, whe-

# Marchal and Marchallea.

See 6 Mod. 57, 325.

#### Anonymous.

[Mich. 9 W. 3. B. R.]

Bond to the marshal to be a true prisuner, good.

DER Holt, C. J. It was adjudged in the case of Sir Ja. Lenthall versus Cooke, that the marshal might take a bond to be a true prisoner; but not to receive or take any thing of advantage or profit to himself, and that if he did, the bond was void at common law.

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#### Anonymous.

[Mich. 10 W. 3. B. R.]

Jurifd Ction of theParace Court.

Prohibition was prayed to the + Marsbalsea, because they refused to admit a plea, that neither of the parties were de hospitio regis. Per Holt, C. J. This is not the court mentioned in my Lord Coke's case of the Marsbalsea, If the cause of action arise within twelve miles of London, this Court holds plea, though the parties are not de bospitio regis; the plea is frivolous, and we will not interpose. But Trin. 11 W. 3. B. R. an action of debt was brought in the Marsballen, on a judgment in B. R., and a prohibition was granted.

+ Nota. This must have been to the Palace Court, where neither plaintiff nor defendant must be of the king's household; but, in a suit in the Marshalfea, both must be of the king's household.

#### 3. Snow versus Firebrass.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 804. S. C.]

Earl martial of the King's

East martial of England was for-england was for-martin martial of affigned in this, that the defendant had not rendered merity marshal of himself prisone mar. Marisc. domini regis. Mr. King ob-Bench. 3 Salk. jected, that it was not good, without going on and faying, 320. S. C. coram ipso rege existentis, for the king has another marshal, viz. the marshal of the household. Et per Holt, C. J., and Powell. The earl marshal of England was by his office marshal of the King's Bonch, as appears by the book of H. 6., and se continued till the time of King James the first, when this office was derived out of it; so that the marshal of the king is the marshal of the King's Bench; no body else can be understood; the other is mareschallus hospitii, and never spoken of without that addition.

The office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; and therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. Per Helt, C. J. Mich. 3 Ann. B. R.

## Macter and Servant.

#### 1. Boson versus Sandford & al.

[Mich. 1 W. & M. B. R. Intr. Hill. 1 & 2 Jac. 2. Rot. 302.]

C ASE against A. and B., part-owners of a ship, for Goods are spoiled that he put goods on board, and the defendants un-by the default of dertook to carry them fafely for hire, but yet were so ne- the master of a gligent that the goods were spoiled. Upon not guilty ship, employed by owners; the pleaded, in evidence it appeared, that C. and D. were owners are siable also part-owners, and that the ship was under the care of in respect of the affo part-owners, and that the thip was under the care or managed or the a mafter, to whom the goods were delivered; and this being found specially, it was argued pro quer., that the action is grounded on the wrong, and may be against all, or a Saund. 260.

There was also another doubt the proprietors. There was also another doubt the company were liable. started, and that was, Whether the owners were liable, the owners; when in truth they did not undertake, but in fact the 2 Saund. 115.; for he that em after fuper se susceptible sus owners in the eye of the law; and that the power he has 323. Moll. 208, of hypothecation, &c. is by the civil law. Et per Holt, 209. But the C. J. The owners are liable in respect of the freight, and action must be brought against as employing the master; for whoever employs another all the part. is answerable for him, and undertakes for his care to all owners. I Salk. that make use of him. 2dly, The Court held, that all 10, 31. 1 Bulk. the owners were liable, for they are charged, in point of 3 Mod. 244. contract, as employers, and are all equally entitled to the 1 Mod. 18. freight. Either master or owners may bring an action for 1 Ld. Raym. the freight; but, if the owners bring the action, they must Rep. B. R. all join; ergo they must all be joined; as the freight be- Temp. Hard. longs to all, so all are equally undertaking; and a breach 85, 194.

See Vaug. 142, 243. 2 Lev. 27 352. S. C. 1 D. 3 Mod. 311. I Show. 29,101. Comb. 116. 2 Lev. 256. 2 Show. 478. Carth. 58. 3 Salk. 203. Skin. 278. Hols 648.

of trust in one is a breach of trust in all; as where two make one officer, the act of one is the act of the other. adly, The Court held this was not an action ex delicto, but ex quasi contractu, and it was not the contract of one but of all: That there was no other tort but a breach of trust. Therefore the Court gave judgment for the defendant, because all the owners were not joined (a).

in abatement, that there are others who ought to be, and are not, joined with him; and he will not be allowed to give it in evidence, and nonsuit the

(a) But a defendant now must plead plaintiff, Rice v. Shute, 5 Bur. 2613. 2 Bl. Rep. 696. The same was also decided in Abbott v. Smith, 2 Bl. Rep. 947., where this case is commented upon and denied,

#### [441] Pawns. Vide Poft. 522.

#### Jones versus Hart.

[Mich. 10 W. 3. Coram Holt, C. J. At nisi prius at Guildhall. 1 Ld. Raym. 738. S. C.]

Mafter liable for the neglect of his fervant, not the wilful wrong. See prox. pag. ante 282. 2 Cro. 202. Palm. 5;4. 4 Leon. 123. 2 Saund. 345. Hob. 206. 3 Mod. 323. Hatt. 121. 3 Lev. 258. 1 Show. 20. Post. 613, 614. 5 Mod. 9, 340. 2 Saund. 260.

A Pawn-broker's fervant took a pawn; the pawner camo and tendered the money to the fervant; he faid he had lost the goods: Upon this the pawner brought trover against the master, and it was held well, per Holt, C. J.

The servants of A. with his cart run against another cart, wherein was a pipe of fack, and overturned the cart, and spoiled the fack; an action lies against A. So where a carter's servant run his cart over a boy, it was held the boy should have his action against the master for the damage he fustained by this negligence. So in Lane and Cotton (b), a letter with bills in it was delivered at the post-office to a fervant; it was held, case lay against the post-master and not against the servant, unless he stole them, for then he was a wrong-doer, as where a gaoler fuffers an escape Holt 642. S. C. wilfully; otherwise, if negligently. Per Holt, C. J. 2 Lev. 172. Ante 18. 2 Str. 1004.

(b) The contrary was ruled to what is here stated. Vide the case, pa. 17.

#### 3. Domina Regina versus Gouche.

[Mich. 1 Annæ, B. R. 2 Ld. Raym. 820. S. C.]

for work and labour in hufbandry, though it do not appear fuch wages as the flatute di-

Order to pay

42 s., being due

A N order was made by the justices on Gouche, reciting,
for work and la
That whereas 42 s. and 4 d. was due from him to 3. S. for work and labour in husbandry, they order him to pay the same: The exception was, that it does not appear to be statute-wages, and such only are within their jurisdiction. Per Powell and Gould. Though the statute gives rects. Remedies them a power only to fet the rate for wages, and not to

order payment; yet, grafting hereupon, they have also for wages are fataken upon them to order payment; and the courts of law voured in the fuare indulgent in remedies for wages, as appears by its suf- 5 Mod. 419. fering the Admiralty to have cognizance of mariners' Post. pl. 5, 485. wages; and therefore they would intend it such wages as pl. 40. were within the statute: And Gould, J. cited a case, The King against Dummer, an order to pay for days-works and Vi. Carth. 156, sabour done, which was held well; for the Court will in- Str. 8. Fortese. tend it within their jurisdiction upon general words, unless 2. c. 9. the contrary appear upon the face of the order, as in the case, 2 Jones 47. for a coachman's wages. Affirmed, Holt absente,

#### Ward versus Evans.

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[Hill. 2 Ann B. R. 2 Ld. Raym. 928. S. C. Comyns 138. s. Ć.1

WARD fent his fervant to receive a note of 50 % of Act of a fervant B., who went with him to Sir Stephen Evans's shop, binds not ble master, unless he who indorsed off 50 l. from a note B. had upon him, and acts by authority gave Ward's servant a note of 50 l. upon one Wallis a gold- of his matter, or fmith, to whom the note was carried the next day by a Lev. 172. Ward's servant: Willis resuled to pay, and that day 3 Lev. 252. broke; upon this the note was sent back to Sir Stephen Comber. 451. Evans, who refused payment, whereupon the action was 13ak. 13a, Winch. brought. Et per Cur. it was held, 1st, That this was mo- 24, 25. 5 Mod. ney received by Sir Stephen Evans. 2dly, That the act 398, 399-6 Mod. 36. S.C. of a fervant shall not bind the master, unless he acts by au3 Salk. 118.
thority of his master; and therefore if a master sends his Case B.R. 521. fervant to receive money, and the servant, instead of mo- Holt 1200 ney, takes a bill, and the mafter, as foon as told thereof, R. sec. 10 Mod. disagrees, he is not bound by this payment, but acquistop. Vide i BL escence, or any small matter, will be proof of the master's Com. 429.

1 Str. 506. Esp. consent, and that will make the act of the servant the act 115. 3 Bac.

Ab. 560. Fena v. Harrison, 3 T. R. 757. 4 T. R. 177.

3dly, They held this was no payment; for a gold mith's Gold mith's note is only paper, and received conditionally, if paid; notes are payment and not otherwise, without an express agreement to be only, without taken as cash.

4thly, They held, that the party receiving such note Post 507, 508. should have a reasonable time to receive the money, as in 3 Mod. 86. this case, the next day, and is not obliged, as soon as he 3 Lev. 299.

Moll. li. 2. receives it, to go straight for his money (a).

: . .

express confent. See 6 Mod. 36. c. 10. Hob. 154.

(a) Vide Str. 415, 416, 508, 533, 171. Beawes 461. Kyd 29, 80. 1175, 1248. Bailey 33, 73. 1 T. R.

#### Domina Regina versus London.

[Trin. 3 Ann. B. R.]

In order for payment of fervants wages, if it do not appear in court will intend it husbandry. Vide Puft. 484. 441. 3 Salk. 261. S. C. 6 Mod. 2-4. Set. and Rem. 231. 3 T. R. 496.

ORDER was for payment of wages, reciting, That two persons were retained by London, overseer of the works in the gardens of Hampton-Court, at so much perwhat service, the diem, and had worked there so many days; therefore the order was, that London should pay them. Et per Cur. The statute extends only to servants in husbandry, not to pl 40. 5 Mod. gentlemen's fervants, nor to journeymen with their maf-419. Ante, pl. 3, ters. Had the order been general, wiz. to pay so much to two of his labourers, &c., or two of his servants, the Court should have supposed them servants in husbandry; but here is no room for such an intendment, since the contrary appears.

#### [ 443 ]

Vide 2 Lev. 69, 188, 228. 3Lev. 37, 258, 351. S. C. 3 Let. 320. 4 Mod. 58. Show. 320. S. C. Carth. 216. Holt 465.

# Merchants and Merchandize.

#### 1. Jeffries versus Legandra.

[Hill. 2 W. & M. B. R. Rot. 659.]

In policies warranted to depart with convoy, shall be intended without wilful default of the master. Vide ante 440. 6 Mod. 13. 4 Mod. 176. 1 Salk. 31. Molioy, lih. 2. c. 7. f. 12. 2 Keb. 717, 722

ACTION on a policy of insurance; the desendant pleaded non assumptes, and the jury sound the policy, by which the insurers undertook against perils of sea, pirates, enemies, &c., from London to Venice, warranted to depart with convoy. Et per Cur. The words warranted to depart with convey mean only, that he will leave the port, and fail with the convoy, without any wilful default in the master; therefore if, by default of the master, the ship is feparated and taken, the infurers are not liable; but if there be no default, the master having done all that could be done, and the ship is separated and taken by enemies, the infurers are liable; so if the ship be lost by stress of weather, for they insure against these by their own agreement (a).

convoy for the whole voyage; and the 210 2 Str. 1250. Park. 397. same was ruled accordingly in Lilly v.

(a) In the report of this case in Ewer, Doug. 74; though this case of 3 Lev. it is said, that the words to de-part with convey extend to sail with be no breach of the warranty. Vide

#### 2. Lethulier's Cafe.

[Mich. 4 W. & M. B. R.]

ACTION on a policy of insurance by the desendant Warranted to at London, insuring a ship from thence to the East In- depart with convey, shall intend to depart with convey; and shews, that the from the place of thip went from London to the Downs, and from thence having convoy. with convoy, and was loft. After a frivolous plea and de- 3 Lev. 320, 321.

Molloy, 1.2. c.7. murrer, the case stood upon the declaration; to which it s. 12. 4 Mod. was objected, that here was a departure without convoy. 58. 2 Keb. 777. Et per Cur. The clause, warranted to depart with convoy, 722. 1 Show.
must be construed according to the usage among mer- 205. 2 Stra. chants, i.e. from such place where convoys are to be had, 1205. as the Downs, &c. (a) Holt, C. J. contra: We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take conyoy in the Downs. Vide Yelv. 136.

in his Treatile on Insurances, 344, ob- of late years it has been tacitly acquiserves that this doctrine has been recognized in several other cases, in from the port of London, which the question has come collate-

(a) R. acc. Str. 1265. Mr. Park, rally before the Court, and that indeed esced in; for there never is a convoy

#### 3. Martin versus Crump.

[444]

[Paf. 10 Will. 3. B. R. 1 Ld. Raym. 340. S. C.]

TWO joint merchants make B. their factor; one dies, Survivorship. leaving an executor; this executor and the furvivor 188, 189, &c. cannot join, for the remedy survives, but not the duty; 2 Lev. 188. and therefore on recovery he must be accountable to the Comber 474executor for that. 116. Cro. Jac. 410. 1 Rol. Rep. 421. Com. Merchant D.

#### Green versus Young,

[Hill. 1 Ann. B. R. 2 Ld. Raym. 840. S. C.]

F after a policy of infurance a damage happens, and af- Deviation difterwards, in the same voyage, a deviation; yet the as- charges policy fured shall recover for what happened before the deviation; from that time only. Vide acc. for the policy is discharged from the time of the deviation Str. 1249. only.

Vide Shower 189. Kemp and Andrews: The remedy fur- feq. vives between two joint merchants, but not the interest.

Doug. 16, 346. Park. 349. ec

#### Anonymous.

[Hill. 1 Ann. B. R.]

Detention.

A Ship insured was in her voyage seized by the government, and turned into a fireship: The question was, Whether the infurers were liable? Halt, C. J. thought it was within the word detention; but the cause was referred (a).

(a) This is part of the preceding case, wide 2 Ld. Raym. 840. The point, Whether infurers are liable for damages from detention of ships by the government to which they belong? does not appear to have been judicially decided; but Mr. Park observes (pa. 91), that the very general words made use of in policies go to support the idea entertained by Lord Holt; and though he has found no case where

this point is expressly settled, yet it feems to have been taken as fettled in many cases which have come before before the Court; that in the case of Robertson v. Ewer, 1 T. R. 61., na question was made whether the infurers were liable for loss sustained by fuch a detention, provided it had happened to property specifically in-

#### Bates versus Grabham & al.

[Decemb. 3, 1703. Coram Holt, C. J. At nisi prius at Guild-

Policy altered by content after it was written, well.

N case on a policy of insurance, upon non assumpsis pleaded, the case was, Mr. Crisp being at the West S. C. Hult 469. Indies, fent a letter to Bates to infure goods on the Mary, Galley of St. Christopher's, Captain A. Hill commander, at London. Bates carried the letter to Stubbs, who writ policies, and he by mistake made the assurance on the Mary, Captain Hasterwood, commander, &c. This policy thus made was subscribed by the defendant. The Mary-Galley was loft, and then Stubbs applied to the infurers to confent to alter the policy, to which they agreed, and the mistake was mended. It was objected at the trial, that the Mary was a stouter ship than the Mary-Galley, and that the infurers ought to have an increase of premium for the alteration. But it was held by Holt, C. J. that the action well lay, and that the mistake might be set right, and that Stubbs was a good witness; and he cited this case, which happened when Pemberton was Chief Justice: An infurance was made from Archangel to the Downs, and from the Downs to Legborn; but there was a parol agreement at the fame time, that the policy should not commence till the fhip came to fuch a place; and it was held the parol agreement should avoid the writing.

Park. 3, 4. Motteux v. London Affurance Comp. ; Atk. 545.

[445]

#### Bond versus Gonsales.

[February 14, 1704. Coram Holt, C. J. At nisi prius at Guild-

ASE upon a policy, which was to insure the William- Deviation or not. Galley in a voyage from Rremen to the port of London, Arued according quarranted to depart with convoy. The case was, the galley to usage. S. C. set sail from Bremen, under convoy of a Dutch man of war Holt 469. to the Elb, where they were joined with two other Dutch 1 Bur. 348.
men of war, and feveral Dutch and English merchant Comp. 601.

Chine a whence they filled to the Comp. 601. thips; whence they failed to the Texal, where they found 2 Str. 1265.
Park. 208. a squadron of English men of war and an admiral. After a stay of nine weeks they set out from the Texel, and the galley was feparated in a storm, and taken by a French privateer, taken again by a Dutch privateer, and paid 80 1. falvage. And it was ruled per Holt, C. J. that the voyage ought to be according to usage, and that their going to the Elb, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for thips die rectly from Brensen to London: And the plaintiff had a verdict.

#### 8. The Mayor and Commonalty of London versus Wilks.

[Trin. 3 Annæ, B. R.]

A Merchant includes all forts of traders as well and as Merchant, quid? properly as merchant adventurers. Vide Spelm. Guilda, Dy. 279. b. A merchant-tailor is a common term, Per Holt, C. J. (a)

ring to this case, says, "Generally every one shall be a merchant who chant adventurers, merchants dormant, trafficks by way of buying and felling, travellers, and merchants refident, or bartering of goods or any mer-chandize within the realm, or in fo-

(a) Ld. Ch. Baron Comyns, refer- reign parts, Dig. Merchant, A. There are four species of merchants-mer-2 Brownl. 99.

See z Salk. 25. a Keb. 463. Latch. 84. Yelv. 80. &c. infra.

#### Dixon versus Willoughs.

[Mich. 8 Will. 3. B. R.]

Indehitatus affumpfit in 131. 30 s. for nine 28. Cro. Car. 5 Mod. 6, 7. Lutw. 487, 488. # Salk. 9, 22, 25. S. C. Ante 511. 3 Salk. 239. Holt 471. Comb. 327, 387. S. C. Vide Co. Lit. 207. a. but pote 1. to Co. Lit 107. b.

N case upon four several promises, there was a verdick for the plaintiff, and entire damages. It was moved guineas, well. in arrelt of judgment, that who can be arounded to him in Latch 84. Yelv. viz. That whereas the defendant was indebted to him in 13 1. 10 s. for nine guineas, he promised to pay, &c., and 515 Palm.4-7. says not, nine guineas ad valorem, &c., as he ought, the value being not ascertained by proclamation. Et per Holt, C. J.:

1st, Any piece of money coined at the Mint is of value as it bears a proportion to other current money, and that Cases B. R. 100 without proclamation. The unit was the old piece, which was 20 s. In King James the First's time, the unit was by proclamation raised 16 d., which was the reason and occasion of the coin of guineas, and of their being 16 d, short of the unit.

> 2dly, There are guineas of 40 s. a-piece, and so we will intend these were, and that the plaintiff was satisfied the

> adly, That it was not necessary to set forth the number of the guineas; for in an indebitatus assumptit the confideration is only fet forth to shew it was not a debt by bond, Gr.

#### [ 447 ]

Vide 3 Mod. 131. i Mod. 18. Vaugh. 345, 346. 3 Lev. 351, 352. 2 Jon. 53, 54, 353, &c. Brown!. 296. F. N. B. 222. S. C. Comb. 84. 3 Rol. Rep. 4. 3 lnft. 181. Inft. 540. Holt 475.

## Monopoly.

#### Edgeberry and Stephens.

A Grant of a monopoly may be to the first inventor by the 21 Jac. 1.; and, if the invention be new in England, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within this realm; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to the kingdom, and whether learned Hawk. ch. 99. by travel or by study, it is the same thing. Agreed by L. Holt and Pollowson, in the cose of Education. Holt and Pollerfen, in the case of Edgeberry and Stephens.

## Monstrans de droit. &c.

Vide 5 Mod. 57, 58. Ryley Plac. Parl. 257, 352. Staundt. P. C.

#### Domina Regina versus Mason.

[Trin. 1 Ann. B. R.]

T was found by inquisition, that Ford had forseited his If the plaintiff office of warden of the Fleet, upon which it was seized fails in his title, he cannot take into the queen's hands. One Majon brought a monftrans advantage of de droit in Chancery on the inquisition, and sets forth a want of title in title, and traverses Ford's being seized of the office, so that the orown, or of by consequence he could not forfeit it; the attorney-gene- S. C. Far. 12. ral demurred. The cause was brought into B. R. per proprias manus of the Lord Chancellor; and now it appeared that Mason's title, as set forth, was naught; whereupon Majon, as amicus Curia, infifted ftill that Ford had not forfeited, and so the queen had no title; and therefore it was urged, that no judgment could be given for the queen, and that the whole record was here, and the record being here, the whole record was to be affirmed or subverted by the judgment of this Court. Et per Cur. The very record of the inquisition itself is not before us, but only the record of the monstrans de droit : For, as to the in- vide Faref. 32. quisition, the monstrans de droit recites it, and concludes prout patet per record. inquisitionis in filaciis Curiæ Cancella- The record of rie; and the monstrans de droit may set forth the inquisi- the inquisition is tion, with an inter alia, and over may be craved of it. only before the Court, with re-2dly, The Court held, that though the very record of the spect to the inquisition was not so before the Court, as that they could palaintiff; but quash or subvert it, with respect to all persons or parties; not in respect to so as no other person could at any time after come into parties. Chancery and shew his right, for that would be inconvenient; yet it was here with respect to the party plaintiff in this monstrans de droit, so that if thereby a title appeared for him, the Court might give judgment; and if the inquisition be falsified, it shall be set aside, so far as to make way for the party's right; and if the party's right can be collected from the inquisition, it shall be affirmed by the judgment; so was Holland's case, and so is Kel. 93. 3dly, They held, that if it appears that he that fued the vide 1 Salk. monstrans de droit has no right, he cannot mend his case by 395. 5 Mod. 57. exceptions to the inquisition taken as amicus Curie, though by those exceptions it appears the queen has no right, or that a stranger has right; for the party that sues a mon-

a stranger's title.

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18

#### Wicttannes.

firans de droit is a plaintiff, and may be nonsuit. 4 H. 6. 12. And, if he fails in his own title, he is gone as effectually as if he were nonfuit, and no judgment needs to be given for the queen; accordingly judgment was given here, quod nil capiat per billam suam de monstratione sua prad.

#### [ 449 ]

Vide 1 Chan. Caf. 2, 22, 59, 202, 166, 285. 2 Chan. Caf. 23, 29, 52, 97, 221, **306.** 

## Mortgages.

#### 1. Lord Offulfton contra Lord Yarmouth.

[Decem. 1707. In Canc.]

not paid, shall be screft, is void. 2 Chan, Caf. 59. Vide 2 Atk. 330. Treatise 330. 1. 119.

Proviso, That THE Earl of Yarmouth made a mortgage to my Lord future interest, if The Earl of Yarmouth made a mortgage to my Lord Osfulston, with a proviso, that if the interest was benot paid, shall be taken as principal, and carry interest. Et per Cowper, Lord Chancellor, this clause was decreed to be vain, and of no 226, 51, 258. use, taying, to precedent near over a the time of a Chan. Cal. 35, interest so far, and that an agreement made at the time of use, saying, No precedent had ever carried the advance of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

#### Taylor contra Wheelet.

[Mich. 8 Ann. In Canc.]

1 Chan. Cafes 119, 150, 166,

Mortgagee or purchasor precedent, though by ment, and there never was any presentment made; and veyance, shall be the question was, Whether the assignee of the commispreferred before fioners of bankruptcy, or the mortgagee, should be preaffiguees of com-missioners of ferred? Et per Couper, Lord Chancellor, Though the furbankrupt. See render was void in law for want of a presentment, and that might be the laches of the mortgagee in not procuring it; yet the furrender has a lien, and bound the land 167, 201, &c. Curing it; yet the intreduct has a near, and sector S. C. Eq. Ab. in equity (a), and the affiguee ought not to be in a better

(a) As to the relation of the ad- Scott, ante 185, and the authorities mittance to the furrender at law in therein referred to. Rot V. Griffith, 4 Bur. 1952. Benjon V.

case than the bankrupt, who was plainly bound in equity 122. p. 3. 312. by this desective conveyance. Et come moy semble, he be564. Vern. 267. came a trustee for the purchaser [mortgagee] (a).

a bankrupt fland in his place, and are

(a) The creditors and affignees of persons, Co. Bank. L. 325. Vide Tyrrell v. Hope, 2 Atk. 558. Pye v. Dau-Subject to the same equity, and bound buz, 3 Bro. 595. Finch v. Lord Winby all acts fairly done by him; for, al-chelsea, 1 P. Wms. 277. Jacobson v. though the Court will favour creditors Williams, id. 382. Bofwil v. Brander, as much as they can, it must be where id. 458. Bushnan v. Pell, Cox's note, they have a superior right to other ibid. Russel v. Russell, 1 Bro. 269.

#### Cope contra Cope.

#### [In Canc.]

. F a man mortgage lands, and covenants to pay the mo- Where perfond ney, and dies, the personal estate of the mortgagor estate shall be applied to pay off shall, in favour of the heir, be applied to exonerate the mortgage in exomortgage: So it is, though there was no covenant, if the neration of land. mortgagor had the money; \* because it was his debt, and S. C. Eq. Ab. he is bound to make it good though the land be a defective Hardr. 512. fecurity; but if grandfather mortgages and covenants to #[450] pay, and the lands descend to his son, and his son dies, 1 Chan. Cas. 81, having a personal estate and a son, the son's personal estate 223, 271, 2855, shall not go in aid of this mortgage. A. mortgages his Rep. 98, 243, land to B., and after sells it to C. for 1000 l., which in
Rep. 98, 243, 183, 191.

cludes the mortgage money; C. the purchaser shall pay 2 Chan. Cas. 98, the mortgage, for he has made it a debt in himself: But 165, 187, 221.

It is to be understood that this concration is not to be al- 274, 396.

Lowed, unless there be personal affets sufficient to pay all 3 Chan. Rep. legacies; for the mortgage shall be paid out of the land if 212, 213. Vera. there be not personal affets to pay the legacies; and if by fuch payment affets fall short, the legatees may make such mortgagee refund (b).

(b) The doctrine upon this subject is collected in the following note, by Mr. Cax, to the case of Howell v. Price, 1 P. Wms. 290. "The personal estate of a testator shall in all cases be primarily applied to the discharge of his personal debt (or general legacy), unless he, by express words, or manifest intention, exempt it, 2 Ath. 625. 3 Ath.

2 Ath. 624. Anderton v. Cooke, and Ky202. Hastewood v. Pope, 3 P. Wms. naston v. Kynaston, (cited) 1 Bro. Ch.
324. French v. Chichester, 1 Bro. P.C. Rep. 456. Holiday v. Bowman, cited
192. Fereyes v. Robertson, Bunb. 302. 1 Bro. Ch. Rep. 145. Webb v. Jones,
Walker v. Jackson, 2 Ath. 624. Bridge2 Bro. Ch. Rep. 60. Every loan cre-

1 Wilf. 82. Samwell v. Wake, 1 Bro. Chan. Rep. 144. Duke of Ancaster v. Mayer, 1 Bro. Chan. Rep. 454. Yet it may be exempted, as in Bampfield v. Wyndbam, Prec. Chan. 101. Wainwright v. Bendlowes, 2 Vern. 718., and Ambler 581. Stapleton v. Colville, Caf. Temp. Talb. 202. Walker v. Jackson, man v. Dove, 3 Ath. 202. Earl of In- ates a debt from the borrower, whechiquin v. French, Ambler 33., and ther there be a bond or covenant for payment payment or not, Cope v. Cope, fupra. Howell v. Price, 1 P. Wins. ubi fupra. Balfb v. Hyam, 2 P. Wms. 455. King v. King, 3 P. Wms. 358. So it shall be, although such personal debt be also sccured by mortgage, as in the said cases of Howell and Price, Cope v. Cope, and in Pockley v. Pockley; 1 Vern. 36. King v. King, 3 P. li ms. 360. Gatton v. Hanccek, 2 Atk. 436. Robinson v. Gee, 1 Vez. 251. Earl of Belvidere v. Rochfort, 6 Bro. P. C. 520. Philips v. Philips, 2 Bro. Cb. Rep. 273. So lands fubject to or devised for payment of debts, shall be liable to discharge such mortgaged lands either descended or devised, Bartholomew v. May, 1 Atk. 487. Marchioness of Tweedale v. Earl of Coventry, 1 Bro. Cb. Rep. 240.; even though the mortgaged lands be devised expressly subject to the incumbrance, Serle v. St. Eloy, 2 P. Wms. 386. So lands descended shall exonerate mortgaged lands devised, Galton v. Hancock, 2 Atk. 424. So unincombered lands and mortgaged lands, both being specifically devised (but expressly after payment of all debts) shall contribute in discharge of fuch mortgage, Carter v. Barnardifton, But in all these cases, the debt being considered as the personal debt of the sestator himself, the charge on the real estate is merely collateral. The rule, therefore, is otherwise where the charge is on the real citate principally, although there he a collateral personal security; Countess of Coventry v. Earl

of Coventry, 2 P. Wms. 222. Edwards v. Freeman, 2 P. W.ms. 437. Wilfon v. Earl of Darlington, 2 P Wms. 664. note; Ward v. Ld. Dudley, 2 Bro. Cb. Rep. 316.; or where the debt (although perfonal in its creation), was contracted originally by another, Cope v. Cope, Supra Bagot v. Oughton, 1 P. Wms. 347. Leman v. Newenbam, 1 Vez. 51. Robinfon v. Gee, 1 l'ez. 251. Parfons v. Freeman, Ambler 115. Lacam v. Mertins, 1 Vez. 312. Perkyns v. Bayntun, 2 P. Wms. 664. note; Lawjon v. Hud-Son, 1 Bro. Cb. Rep. 58. Shafto v. Shafto, 2 P. Wrus. 664. note; Baffett v. Percival, ibid. Eart of Tankerville v. Fawcett, 2 Bro. Chan. Rep. 57. Tweddell v. Trockdell, 2 Bro. Chan. Rep. 101, 152. Billingburst v. Walker, 2 Bro. Cb. Rep. 604. With respect to the priority of application of real affets (when the personal is either exempt or exhausted), it seems, 1st, That the real estate, expressly devised for payment of debts, shall be applied. 2dly, (To the extent of the specialty debts), the real estate descended. 3dly, The real estate specifically devised, subject to a general charge of debts. Galton v. Hancock, 2 Atk. 424. Powis v. Corbett, 3 Atk. 566. Wride v. Clarke, 2 Bro. Cb. Rep. 261, note. Davies v. Top, 2 Bro. Cb. Rep. 259, note. Denne v. Lewis, 2 Bro. Cb. Kep. 257. As to marshalling assets, wide note to Clifton v. Burt, 1 P. Wms. 678. inserted 2 Salk. Vide also Cex's note to 2 P. 416. Wms. 664.

Vide Records 565. Rules, &cc. 597. pag. 598. pl. 3. & 647. pl. 14. Vide post. 671.

## Motion.

# 1. Hinton versus Hern.

[Hill. 9 Will. 3. B. R.]

Franchite cannot be attorned on bridge, the other fide infifted on their privileges, which motion, unless it has been for
N a motion for prohibition to the university of Cambridge, the other fide infifted on their privileges, which are confirmed by parliament. Et per Cur. You must plead

plead them. The difference is, where franchises have merly pleaded been once allowed on plea, and are upon record in court, and allowed, and is upon rethere they may be allowed upon motion ever after; but, cord. Vide where they have not been allowed, it is otherwise; and so 1 Salk. 343. & it was held and done between Cafile and Litchfield, where Cafes B. R. 165. the franchise of Oxford was pleaded; and so they were 2 Wilson 406, obliged to do here.

#### Domina Regina versus Layton.

[Pasch. 4 Ann. B. R.]

PON a conviction of forcible entry, if a fine be fet, the conviction cannot be quashed upon motion, but the defendant must bring his writ of error; otherwise if no fine be fet, for then it may be quashed upon motion:

motion. Ante Per Cur.

1 Stra. 474. 2 Stra. 794.

# Rames of Purchale and Dignity. Hob. 129.

201. Yelv. 34. 1 Sid. 40. 1 Lev. 50. 1 Show. 392. 5 Mod. 303. Ow. 81. Pop. 209. Ney 88. 4 Co. 218. 6. Co. 53. 1 Saik. 6, 50. 1 Ld. Raym. 303, 304, 562.

N indistment was preferred against two chairmen for a Indistment for A battery upon Thomas Lord Marquis of Carmarthen, affaulting a duke's eldeft fon, who was called up to the House of Lords by the name of flyling him by Lord Offern; and it was held by the Chief Justice, that his father's sethere was no such person, or at least the Duke of Leeds cond title scwas the person, and not the prosecutor. At the Old Baily, mon parlance, one was indicted for stealing the goods of the Earl of ill. Post. 500, Kingston, who was the eldest son of the Marquis of Dor- 539, 512. Parliament Cases 2, chefter, and the desendant was acquitted by the opinion of 3, &c. 6 Mod. all the judges, for he was only Mr. Pierpoint. In the 303. Carth. House of Lords, complaint was made against the Marquis 207. Comb. Comb. (Comparted for breach of privilege and the House City 15, Farest. 15, of Carmarthen, for breach of privilege, and the House said 29, 38. there was no fuch person. The defendants were acquitted.

The Prefident and College of Physicians, S. C. 5 Mod. London, versus Salmon.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 680. S. C.]

EBT was brought in the name of the President and Corporation may College of Physicians, on the stat. 14 H. 8. c. 15., for of incorporation, the penalty of 5 1. per month for practifing physic in Lon- notwithstanding

given to fue by another. See Lutw 5:0, &c. 563. Cro. El. 357. Hard. 501. Hob. 210. Vid. 6 Mod. 44. 2 Bulft. 185 R. acc. r Ld. Raym. 153.

an express power don without licence; and, upon demurrer to the declaration, this exception among others was taken, that the action ought to be brought in the name of the College only, or the President only; the words of the patent being, quoa ipsi per nomina presidentis collegii, seu communitatis facultatis medicina, London, shall sue and be sued. 'To this it was answered, that they are incorporated by the name of Prefident and College, and have in consequence of that a power to fue and be fued by that name; and this power is not taken away by the additional affirmative power which is farther given to them. 10 Co. 28. b. 30, 123. 1 Ro. Ab. 513. Fitz. Brief, 485. 5 E. 4, 20. 16 H. 7. 1. 20 H. 6. 4. 44 E. 3 6. b. 11 H. 7. 27. 13 H. 7. 14. And judgment was given for the plaintiff.

[452] 3. Domina Regina versus The Inhabitants of Barking, Needham Market, and Darmesden Hamlets.

[Pasch. 5 Ann. B. R.]

On a certiorari to remove orders. the name of the parith in the the order, must appear to be the 434. pl. 16. 1 Salk. 145, 146, 1 Buift. 159. 1 Keb. 165. Far. 97. Fost. 472.

A Certiorari issued to remove all orders concerning the inhabitants of the parish of Barking, Needhom Market, and Darmesden hamlets, and the orders mentioned writ, and that in Barking, and Needham, and Darmesden hamlets, without Market. Serjeant Weld argued, that they must be taken same. Vide ante to be the same. I Sid. 64. Writ was to the Justice of Chester; return was by the Chief Justice; and I Ro. 334. 15alk. 145, 146, A ward and a liberty of a city is the same: Holt, Č. J. 112. 1Lev. 50. The Chief Justice of Chefter in his patent is called justiciarius, and there was but one till 18 Eliz. c. 8., which gave the queen power to make another, who is styled alter justiciarius, and the first justiciar, and so our writs are directed; we therefore take notice of him, and do not regard his calling himself Chief Justice. The reason of 1 Ro. 334. is, (a) that a ward of a city is no venue, therefore the venue is from the city. A jury may come from a lieu conus out of a city, not from a lieu conus within a city. If Needbam and Needham Market be the same hamlet, so it should have been returned; but we cannot take notice that there is no fuch hamlet as Needham Market. If trefpals quare claufum fregit at Needham were brought, and the plaintiff proved a breaking at Needham Market, he mustbe nonfuit.

( ) Sid. 326. 2 Cro. 222. centr.

## Movel Allignment.

Vide 1 Mod. 89. and Syftem of Pleading, tit. Novel Affirmment and Dock. Placit. 379, 380.

#### Coke versus Evans.

[Trin. 2 Ann. B. R.]

RESPASS for taking the cattle in D. The de- Wheredefendant fendant pleaded, that the locus in quo was twenty by plea makes a transitory trefacres, &c., where he had common, and justifies for da-pass local, the mage-feafant; the plaintiff replied, that he took them in plaintiff may fuch a place, [viz. another.] And it was agreed per Holt, make a new af-C. J. and Powell, that the plaintiff might have a new af- 16. 2 Cro. 141. fignment, which they told Mr. Southouse, subridendo, who Carth. 176. neither confessed nor avoided his bar, but gave it the go-by.

#### Helvis versus Lamb.

[Hill. 2 Ann. B. R.]

TRESPASS for taking and carrying away his goods Where the place in D. The defendant pleaded, that the locus in quo is made material by the defendwas his freehold, and that he took the goods damage-ant's plea, he feafant, &c. The plaintiff demurred generally, and had must hew it judgment; for the action being transitory, there is no lost with certainty. cus in que supposed : Otherwise in trespass quare clausum 117, 119. Carth. fregit in D., the clausum is a locus in quo; but in the prin- 176. Com. cipal case there is no place in particular supposed, only D. vol 5. 3d edit. is alleged for a venue; therefore if the defendant will make pa. 804. Hob. the place material, it must come on his part to shew a 16, 176. 3 Croplace certain: Also in trespass quare clausum fregit in D., 139. Tri. p. if the desendant plead liberum tenementum, and issue be Pais 378. 2 Crop joined thereupon, it is sufficient for the desendant to shew 594. Dy. 23, any close that is his freehold; but if the plaintiff gives the 147. Yelv. 167. close a name, he must prove a freehold in the close named: So adjudged in C. B., and the judgment affirmed in B. R. upon a writ of error.

# Pili Brius.

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#### Bullock versus Parsons.

[Paf. 4 Ann. B. R. 2 Ld. Raym. 1143. S. C.]

Diftringes with a blank for the Holt 496. Authority of a Judge of niti prius is affize. Vide post. 456. Raym. 38, 73. 2 lnft. 424.

N debt; after verdict for the plaintiff, Mr. Eyre moved in arrest of judgment, that the distringus was with a cause of action, in arreit of judgment, that the diffringas was with a amendable. S. C. blank, and debits (the cause of action) omitted; so it was a diffringes in another cause. On the other fide it was urged to be as no difiring as, and aided by verdict; and that it by commission of was amendable. Hob. 2.46. 2 Cro. 528. The Court made two questions, 1st, Whether the judge of nist prius had authority to try this iffue? Et per Holt, C. J. The authority of the judge of nisi prius is not by the distringus, but by the commission of assize; for it is the 13 E. 1. c. 30. which gives the trial by nift prius, and by that statute the trial by nish prims is given before justices of affize; and at first these trials by nish prius were always had and made upon the venire facias, and indeed the clause of the nife prius is, by the 13 E. 1. c. 30., expressly ordered to be inferted in the venire facias; and trials by nift prius continued to be upon the venire facias till 42 E. 3. c. 11., which requires that the names of the jurors be first returned into court. By this act two inconveniences were remedied. 1st, The party might now be prepared to make his challenges, the pannel being first returned into court, which was not before; and, 2dly, The defendant was prevented by this means to cast an essoin at nisi prins, which was used frequently before; for, by Marlb. c. 13., the defendant was allowed one effoin, and that after iffue joined upon the return of the venire: By consequence, when that was returned at nisi prius, he could essoin at nisi prius; but now it is returned above, he must essoin above, and cannot now essoin at the trial, because the trial is upon the distringus, and not upon the venire. 3dly. The Court held no distringas, or the want of a distringas, to be aided by verdict, but an ill diffringas was not; and remembered a cafe, wherein Saunders, of counsel at the bar, dropped the difiringas out of his hand, that he might want a distringas, which would be aided, and not keep and shew an ill one, 3 Cra. 622, 258. which would be naught. Also they held it amendable, and gave judgment pro quer.

2 lnft. 126, 127.

Want of a diftringas is aided by verdict, ill dithingus not. Danv. 1 part Tri. p. pais 57. Hub. 246.

## Monsuit, &c.

1 Sal. 21. 6 Mod. 95, 261. Hard. 126, 153. Raym. 38, 73. Farell. 32, 48,

#### Allington versus Vavasor.

[Trin. 12 Will. 3. B. R.]

A Latitat was fued out against four desendants in tres- In trespass pass; the plaintiff was nonsuit for want of a declaration, and the defendant's attorney entered four nonsuits one monsuit for against him; and it was held to be irregular, because the want of declartrespass is joint, and though the plaintiff may count seve- ing. rally against the defendants, yet it remains joint till it is severed by the count (a).

(a) R. similiter on a judgment of non pros. 4 Bur. 2418.

#### Lover versus Salkeld.

[Trin. 12 Will. 3. B. R.]

RESPASS against two defendants, and verdict for Non prof. may the plaintiff; one defendant being an infant, the beentered as to one defendant plaintiff took judgment against the other, and entered a after interlocunon prof. after the judgment against the infant. Upon tory judgment, this judgment the plaintiff sued out execution, upon which not after final.

Vide 1 Cro. Ha. error was brought: And Mr. Northey objected, that the ger verf. Wood. execution and judgment could not vary from the demand Co. Entr. 650. of the writ: Raymond contra. Torts are feveral, and the B. & 676. b. Raft. Entr. 582. plaintiff may as well enter a non prof. quoad one defendant b. Hob. 70, 108. upon a trial by verdict, as if one defendant had demurred, 11 Co. 50. b. and verdict against the other; and that a non. prof. may be 3 Cro. 762.
Vide Doug. 163. entered after judgment as well as before; and for non prof. (161.) entered after judgment, he cited 15 E. 4, 26. 14 E. 4. 6. Hob. 71. 1 Ro. Rep. 379. 2 Ro. Abr. 100. pl. 5. Holt, C. J. faid, he supposed those were interlocutory judgments wherein it might well be, but a final judgment differed; for that being once wrong, a subsequent entry would not fet it right. Adjournatur.

455 1

S. C. Farell. 12.

#### Cooke versus Foster. 3.

Trin. 1 Ann. B.R.]

fendant files bail without arrett. plaintiff may be non-proffed Carth. 172.

F a man appear at the day of the return of the process and put in bail, though he never was arrested, nor the process returned; yet if the plaintiff does not declare against him in two terms, a non prof. may be entered against him.

[ 456 ] S. C. 1 Salk. 21. 6 Mod. 261.

#### 4. Goddard versus Smith.

[Mich. 3 Ann. B. R.]

262. I Sid. 420. 1 Vent. 32. Mod. 208. Hard. 126, 153. Comber. 18. Entries of non 216. 8 Co. 58, 2 Keb. 521. 5 Mod. 394. Hard. 126, 153. TRol. Abr. 786. pl. 2.

Vide 11 Co. 65, 66. 6 Mod. 95, A Discharge by nolle prosequi upon an indictment, is not sufficient to maintain an action for a malicious prosecution. Vide this case, title Action sur le Case, pl. 11.

Vide Co. Ent. 650. d. In trespass, several issues, one found for the plaintiff, & super boc idem quer. gratis bie in pros. 6 Mod. 25, Cur. cognovit se ulterius nolle prosequi versus le desend. de ceteris exitibus, upon which here is an eat inde fine die, and the plaintiff has judgment for the other; et vide ibi 676. &c., issue for part, and demurrer for part, in an action of trespaís, and verdict pro quer. upon the issue; upon which the plaintiff enters a non prof. in this manner: Et super hoc idem quer. quoad materiam prædict. unde partes prædict. pofuerunt se in judicium fatetur se nolle materiam illam, &c., uherius quovismodo intromittere: Ideo idem defendens eat inde fine die, &c., & superinde idem querens petit judicium de dampnis pradict. &c. Ideo confideratum est, that the plaintiff recover; and that the plaintiff be amerced pro falso clamore as to the rest, & quod defendens eat inde fine die. Vide ibi 28. Jury came in with their verdict, and the plaintiff was nonfuit, and the entry is, super que querens solemniter exactus non revenit, nec est prosecutus billam suam, super quo consideratum est quod nil capiat.

#### Greeves versus Rolls.

[Pasch. 4 Ann. B. R.]

38, 73. 12 Ed. 8. C. 4.

Judge of nili prius may receive a non prof. at the affizes; so it was held by two judges, and that judgthe affizes. Vide ment was affirmed in the House of Lords against the opiante 45+ Raym. nion of Holt, C. J. For before the statute of York, the justtices of nisi prius had no power to record a nonsuit or default in the country, and consequently have no power now

to enter a non prof., which is not within that statute. At In ejectment common law they could not record a non prof., default or against several, if some confess nonsuit. Nota; The principal case was, ejechment against lease, &c. and feveral, who all entered into the rule of leafe, entry, and others do not, onfter; at the affizes fome would confess, and others go on as to the would not: The plaintiff, as to those who would not con-former, and be fefs, entered a non prof., and went on against the others, nonsuit as to the and recovered; upon this a rule was made, that in like cases the plaintiff should go on against those who would confess, and as to those who would not, should be nonfuit; but that the cause of the nonsuit should be expressed in the record, viz. because those defendants would not confess lease, entry, and ouster; and upon the return of the poster, the Court would be informed what lands were in the possession of those defendants, that the judgment might be entered against the casual ejector as to them (a).

It was agreed in the arguing of this cause, that where Where several there are several desendants, and they sever in plea, in plea, in plea, plaintiffs whereupon issue is joined, that the plaintiss may enter a may enter non non prof. as to one defendant at any time before the record prof. against one, is fent down to be tried at nisi prius.

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any time befine record fent down.

2 Rol. Abr. 100. Hob. 70.

(a) This case is reported in 12 Mod. 651. as of Hil. 13 W. It appears that the case was, that the plaintiff entered a retraxit at nift prius as to one defendant, which the Court held to be irregular; and it was laid down, that where there are several desendants, and one refules to confess, &c. he should be acquitted, [not that the plaintiff should be nonfuit as to him; and thereupon judgment should be given against the casual ejector. And, as in

1 Bur. 359. the report in Salkeld is stated to be wrong, the case was probably as reported in 12 Mod. Vide also the reports of this case, 1 Ld. Raym. 716. Comyns 113.

If the plaintiff obtains judgment by default against one defendant, he cannot be nonsuit as to another, Weller v. Gayton, 1 Bur. 358. Harris v. Butterley, Cowp. 485. Hannay v. Smith, 3 T. R. 662.

## Rotice. &c.

Vide 5 Mod. 96, 129, 257, 330, 442, &c. 2 Show. 316. 2 Lev 21, 106, 152. Lutw. 404, 409, &c. S. C. Post. 650.

Lazier versus Dyer.

[Mich. 2 Ann. B. R,]

ISSUE being joined and entered, as of Trinity term, If there be no the plaintiff rested till the Trinity term following, and fact within son then gave notice of trial after the term; and a venire facias terms, there

must be a term's and distringus was taken out in the vacation, but tested notice of trial.

Vide post. 645.

I Mod. 1.

This is not fufficient notice; for though in law, this was a proceeding 6 Mod. 18, 146. within the term, yet in fact it was a proceeding in vaca-6 Mod. 57. S.C. tion, and therefore there was not a term's notice of trial. vers. Dyer. 1 Keb. 112. 1 Sid. 34, 231. 2 Lilly 151, 356. 2 Bl. Rep. 784. Doug. 71: Str. 531, 1164.

### Smith versus Goff.

[Paf. 4 Ann. B. R. 2 Ld. Raym. 1126. S. C.]

Notice not necessary to be alleged, where the tended to be 230, 239. 5 Mod. 330. Far fl. 143, &c.. 5 Com. Dig. tit. Pleader, c. 61. pa. 362. 31 cait.

PLAINTIFF declares, That whereas H. owed him 30 1. by bond, the defendant promised, that, if the thing can be in. plaintiff delivered up the faid bond, he would pay him the faid 30 l., and fays, he delivered up the faid bond to H., known without it. See 6 Mod. unde the defendant had notice, and had not paid it. On 182, 200, 259, non assumptit pleaded, verdict was for the plaintiff. Upon 288. 4 Mos. motion in arrest it was half and Till tended to the obligor, for that is properly a delivering up; and delivering up must be construed the most effectual delivering; which is fuch as that the bond may be cancelled. 2dly, There needs no notice, because the defendant knew c. 75. pa. 367. whom to refort to; and the difference is, where a person is named, and where not.

[458] Vide o Co. 57, &c. 5 Mod. 2, 2. Raym. 71. 6 Mod. 145. Vaugh. 333, 340, 358. 1 Mod. 55, 76, 163, 202.

# Muisances.

Rex & Regina versus Wilcox.

[Hill. 1 W. & M. B. R.]

Fine pardoned by general pardon, but abate-333. 1 Hawk. 497. 12 Co. 30.

THE owner of the glass-house at Lambeth was indicted. for maintaining that house, being a nusance, and was ment not excus- convicted and fined; and now it was moved, that by the ed. Vide Vaugh. act of general pardon the defendant was excused and difch. 75. fec. 12. charged, both as to the fine and the abatement of the nu-2 Hawk. c. 37. fance: But the Court upon confideration held, that he icc. 33. Plowd. should be discharged only as to the fine and not as to the abatement, for that is not a punishment of the party, but a removal of that which is a grievance to other people, and any person may abate a common nuisance.

### Palmer contra Poultney.

See 2 Mod. 233. Lutw. 1 586, &c.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 276. S. C. named Shalmer v. Pultney.]

Q TOD permittat profternere quedam edificia ad nocu- Quod permitte ment., &c. And the Court held, that a quod permittat lies de militar. will lie de adificio: but vide Noy 68. 3 Cro. 520, 402. It Cro. Jac. 555 lies not de mole, F. N. B. 110., it lies de fabrica, F. N. B. Cio. Car. 185. 184., which the Court held as uncertain as adificium. Also 1 Rol. Rep. 394there may be a building without a name; and the Court 1 Jones 222. held, that whether the nusance was by the tenant or a a Rol. 144, 145, ftranger, the plaintiff may maintain a quod permittat, for 565. it is the same prejudice to the plaintiff. F. N. B. 184. Et nota: In a quod permittat the jury have a view; but that did not weigh with the Court, for they faid that could be no direction to the sheriff, though it might to the jury.

### 3. Lodie versus Arnold.

[Mich. o Will. 3. B. R.]

TRESPASS for breaking his close, and throwing in justification bricks and other materials there lying erga confectioa nuisince, it
nem domus de novo erect. into the sea; the desendant shewneed not be ed it was a nusance, being a house built across the way, shewn that he and that he pulled down the walls, &c. and they rolled did it, doing as into the sea. The plaintiff demurred, and judgment was could be. given for the defendant: And, \* 1st, The Court seemed 1 Jon 221. to agree, that the trespass, which is justified, is not the sec. 12. trespass complained of, for that was throwing materials \*[459] there lying; this, which is confessed, is pulling down a adly, That when H. has a right to abate a public nusance, he is not bound to do it orderly, and with as little hurt, in abating it, as can be; and therefore was not answerable in this case for the rolling into the sea. In the Cro. Car. 184, case of James against Haward, the defendant might have 185. Vide 5 Co. Penruddock's opened the gate without cutting it down; yet the cutting Cafe. Mo. 705, was lawful; and the Court denied Hill's case, 3 Cro. 384., 3 T. R. 292. that matter of aggravation need to be answered. But, 1 Lev. 31. 3dly, the Court held, that the declaration was repugnant 408. and insensible; there could not be materials towards the building of a house erect., which is already built.

6 Mod. 116. S. C. Vide prox. pag.

# Rosewell versus Prior.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 39. S. C.]

ancient. Ses Consuevit after verdict in such action, imports ulage time out

In case for stop-ping lights, it must separar that I N an action upon the case for erecting a shed upon the de-ping lights, it must separar that ping lights, it fendant's ground, so near the plaintiff's house that it the lights were stopped up his lights; the plaintiff declared, that he was possessed of a house which had windows, per quas lumen ino Mod. 116, Serebatur & inferri consuevit. After verdict for the plain-Lev. 122, &c. tiff, it was moved in arrest of judgment, that the house & infra 2 Lev. was not said to be an ancient messuage, and the desendant 194. 9 Co. 58. appeared not to be a wrong-doer; for one may erect a shed on his own ground against another's windows, if they are not ancient lights. 3 Cro. 118. And all the precedents of stopping lights have it, either antiquum meffuagium or mind. 6 Mod. antique lumina. I Cro. 325. Pop. 170. 2 Cro. 373. Yelv. 20, 313, 314.
Comber. 481.
S. C. I Vent. out of mind, and we must intend, after verdict, that usage 274,237. Show time out of mind was proved; and so indeed it was in this 77, 64. 3 Mod. case, for otherwise the jury could not have sound for the 48. 3 Kcb. 133. case, for otherwise the jury could not have sound for the Pop. 170. Hutt. plaintiff. The Court seemed to think this declaration 136. Hob. 131. would not have been good upon demurrer. Cafes B. R. 215, 635. Holt 500. Lilly Ent. 31, 82, 83, 516. 1 Sid. 167. 2 Vent. 837.

; Lev. 133. 1 Vent. 239, 248.

# 5. Dominus Rex versus Rosewell.

[Hill. 10 Will. 3. B. R.]

lighte, I may 1 Vent. 237, Com. 5.

H. erects a house which flops my lights, which flops my lights, or shoots the water upon my house, or is in any other pull it down. Way a nurance to me, a many control of the was See 6 Mod. 314, and pull it down; and for this reason only a small fine was way a nusance to me, I may enter upon the owner's soil fet upon the defendant in an indictment for a riot in pull-239, 274. 2 Lev. ing down some part of a house, it being a nusance to his 194- Ray. 87. lights, and the right found for him in an action for stopping his lights.

[460] S. C. ante 459.

# Rosewell versus Prior.

and 6 Mod 116. [Hill. 13 Will. 3. B. R. 1 Ld. Raym. 713. S. C. Pleadings Lilly 81.)

F. N. B. 124. H. Cro. Iac. 373. I Vent. 48.

I N an action upon the case, for that the plaintiff being seised of an ancient house and lights, the defendant feised of an ancient house and lights, the defendant 1 Mod. 27. A had erected, &c., whereby they were stopped. tenant for years was a former recovery for this erection, and this action erests a nutance, was for the continuance; and the case was, tenant for

years

years erected a nulance, and afterwards made an under-under leafeto B. lease to J. S. The question was, Whether, after a recovery against the first tenant for years for the erection, an against either. action would lie against him for the continuance after he See6 Mod. 126, had made an under-lease? Et per Cur. It lies; for he trans- 314. Ante 459. ferred it with the original wrong, and his demise affirms 144, 145. Cra. the continuance of it: He hath also rent as a considera- Car. 185. tion for the continuance, and therefore ought to answer 1 Janes 222.

the damage it occasions. Vide Jones 272. Receipt of 9 Co. 55. a.

rent is upholding. 2 Cro. 372, 555. The action lies Vide 4 T. R.

against either at the plaintiff's election rent is upholding. 2 Cro. 372, 555. against either at the plaintist's election.

# 7. Domina Regina versus Wigg.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1163. S. C.]

INDICTMENT for keeping hogs in some of the Keeping Swincia back streets of London, contra formam flatuti. Mr. a city, a nusance Whitacre moved to quash it, because the swine are for- See 2 Rol. Abe. feited by the statute 2 W. & M., seff. 2. cap. 8. sect. 20. 140, 111. Cra. Ergo no indictment lies, at least not contra formam statuti: Car. 570. 9 Ca. He compared it to the case of the Queen against Watson, 27, 30, 81, 327. which was an indictment for keeping an alehouse, and Palmer 536. held not to lie, because there is another remedy. Curia: Hatt. 136.

Where a new penalty is applied for a matter, which at 1 Bult. 136.

1 Rol. 558. common law was an indictable offence, as in this case for Godb. 183. Be. teeping swine in the city, which is a nusance, either re- Action for le medy may be pursued; but where the statute makes the thestatutemakes offence, that remedy must be taken which the statute the offence, no gives (a): And as to its being contra formam flatuti, that be pursued but is furplufage; but if that was a fault, they faid they would what the flatute not quash it, being for a nufance, but he should demur; gives; otherwise accordingly it was demurred to, and came on in the paper, dichable before. and judgment given for the king (b). Afterwards Mr. Ante 45. Whitacre moved to fet aside the judgment, alleging surprise and want of notice. Sed non pravaluit: But no counsel appeared for the defendant when judgment was given.

(a) Vide note to Stephens v. Watson, Ante 45.

(b) Vide acc. ante 212. Cowp. 6,8. Doug. 441. 2 Hawk, c. 25. fec. 115. 5 T. R. 163.

. For an enumeration of cases which are or are not nuisances, wide note to 6th edit. of 1 Hawk. C. 75. sec. 11. pa. 363.

See 2 Mod. 173. 3 Mod. 108. 2 Show. 68. 475. 5 Mod. 402. 1 Chan. Caf. 11. 1 Chan. Rep. 231. Poft. 549.

# Daths and Affidavits.

# Salloway versus Whorewood.

[Mich. 8 Will. 3. B. R.]

Where, upon thewing cause, new affidavits may be read to

UPON a rule to shew cause, the plaintiff offered several new affidavits, and this diversity was taken, viz. Where they contain new matter, and where they tend only support the rule. to confirm what was alleged and sworn when the rule was made; in the latter case they may be read, and not in the former.

# Dominus Rex versus Jones.

[Hill. 8 Will. 3. B. R.]

' fioners, accord-3 Lev. 426. Hok 501.

Affidavits taken IF affidavits taken before commissioners in the country, before commissioners according to 20 Car. 2. c. s., be expressed to be in a according to 29 Car. 2. c. 5., be expressed to be in a ing to 29 Car. 2. cause depending between A, and B, and there is no such at 5, must be in cause in court, they cannot be read, because the commissions of the cause of the court of the cause of the court of the cause of a cause in court. Some in court, they cannot be read, because the commis-5 Mod. 74. S.C. sioners have no authority to take them, and there can be no perjury; otherwise if there be a cause in court, and this concerns some collateral matter.

# Davis and Carter's Case.

Where an affidavit of a person pilloried may be read. Vide post. 513, 514, 689. 5 Mod. 15. 3 Salk. 461.

Vide Str. 1:48. ícc. 23.

DAVIS and Carter stood in the pillory, and the Court would not allow their affidavits to be read; Hill. 7 W. 2. B. R. But Mich. 4 Ann. B. R. a motion was made to fet aside a judgment for irregularity on the defendant's affidavit; and Mr. Whitacre objected to the reading it, because he was convict of perjury. Et per Holt, C. J. Must he therefore suffer all injuries, and have no way to help himself? Powell, J. You ought to have the 2 Hawk. ch. 46. record of conviction in your hand when you make this objection. But per Holt, C. J. If he had, it would be nothing to the purpose.

# **Dbligation**.

See Cre. Jac. 190, 201, 208 290, 138, 522, 603, 607. 2 Len 35, 166, 220.

# Henderson versus Foster.

[Hill. 3 W. & M. B. R.

IN debt the plaintiff declared on a bond, in trigint. & Sex triginta iifen libris folvend., &c., and upon oper the words of the bris, haid well. bond were fen trigint. libris, and it was held well, and no S. C. 477.
variance; for it shall be taken as one word, as tres vigint. 2 Show. Case
des Junii was taken for the 23d of June. Yelv. 193. Abr. 146, 147. 3 Salk. 74. Carth. 204. S. C. Skin. 310. Com. Oblig. B. 3.

### Cromwell versus Grunsden.

[Pasch. 10 Will. 3. B. R. 1 Ld. Raym. 335. S. C.]

IN debt upon an obligation, the plaintiff declared, quod cum Robertus Erlin, primo die Julii 1674, per scriptum in a Bond. Cro. suum obligatorium concessit se teneri & sirmiter obligari in qua- Car. 116. Mo. dragint. libris, &c. Et profert, &c. cujus dat. est eislem die 864. 2 Bult. Upon non est factum pleaded, the jury found the 423. 2 Jones 58. defendant made a deed in hec verba, and that was, in pre- i Brownl. 110. mid. vigin. in quadrans libris, dated the 1st of July, anno Bond made by regni Car. 2. millimo fexcent. feptua. qto., and figned Robert Erlwin, variance Erlswin, conditioned to pay 20 1., and if this be the same not material. deed, &c. Et per Cur.

1st, The variance between the name signed, which is rejected. Vide Erlwin, and the name in the obligation, which is Erlin, prox. pag. pl. 3. is not material, because subscribing is no effential part of 2 Mod. 285. the deed; sealing is sufficient: The bond is a deed with- B. 3. out it, and so it is of the year of the king. Vide Yelv. 193.

adly, The Court held the words in premid. vigin., and also the anno regni Car. 2. millimo sexcent. septua. qto., to be void for infensibility; and being infensible shall be rejected, the rest being sense without them.

3dly, They held that the word quadrans had been void Sum in the ablia and insensible, if it had stood by itself, as in case there had sation expressed been no condition, or if the condition had been collateral; words, explained but fince it has relation to the condition, they would take by the condition. it to be explained by the condition, and to fignify 401., <sup>2</sup> Cro. 146. Yelv. 65. Cro. there being fomewhat like quature or quadragint. in it, El. 417. Yein

5 Mod. 281. S. C. Vide ib. les Pleadings. 3 Salk. 73, 74. Holt 502. Cases B. R. 193. Quadrans libris Erlin, subscribed 2 Show. 504.

105. Styl. 241, and there are cases as strong and of as odd words. Hob. 257. 2 Rol. 119. Quamquegenta for 500l. Yelv. 95. Cro. Car. 147. 847. l. 37, 45. Cro. Jac. 208. 1 Brownl. 62. 2 Ro. Ab. 146, 147. Cro. Car. 416. 30 Co. 133. Hob. 19. doubted. In most cases where the gent. or gint. or the fex or fept. are right, the obligation has been [463] held well. Vide 2 Jones 48. 1 Cro. 416, 418. 2 Cro.

Impossible date is no date, and the Abr. 706. 27. be the delivery. 2 Brown. 110.

4thly, An impossible date is no date; and where there plaintiff must 18 no date, the plantin new declare of a time made at a certain time, and it is better to rest thereis no date, the plaintiff nevertheless must declare of it as without cujus dat. eft eisdem, &c. or gerens dat. eisdem; for Lev. 348.

5 Mod. 448,&c. that ties it up to the bond mentioned in the declaration;
Yelv. 193. and if that be taken to be the express date, then there is Yelv. 193. and if that be taken to be the express date, then there is 5 Co. 5. 2 Rol. a variance; and the Court held, That if the Plaintiff's declaration had been gerens dat. it had certainly been naught, Farefi. 38. Ge- because that could refer to nothing but the express date; rens dat. must be understood of but being enjus dat. the Court would intend it of the real the express date; date, which is the delivery, and not of the express date; because that being insensible, and as no date, it could not properly be applied to that. Vide 2 Yelv. 193. Styl. 414. 2 Rep. 5. Cro. Eliz. 603. Noy 21.

> And the Chief Justice denied the Case, 2 Cro. 136.; and held, that if H. declares on a bond, as bearing date the 6th of May, he cannot upon non eft factum give in evipence a bond bearing date at another day; but he may give in evidence a bond that bears date the 6th of Mar. though it was delivered at another day. Adjudged.

# 3. Wells versus Tregusan.

[Mich. 7 Ann. B. R.]

80. 2 Mod. 285. Rep. A. Q. 191, 199. \$. C.

Condition of a bond (reciting a bond for 100% defendant demands oper of the condition, which was, whereas the defendant is debt) not to pay, truly indebted to the plaintiff in 50%. Now the condi-See 2 Show. 15, tion is such, that if the defendant do not pay the said 50%. 77, 85. Raym. on or upon, &c. then the obligation to be void, &c. and 61. 2 Saun. 79, pleads, that he did not pay the faid 50%. The plaintiff demurred and had judgment; for when the condition recites debt, and after lays an obligation not to pay it, it is in that repugnant. Vide I Sid. 109. I Lev. 77. 39 H. 6. 10. 0,

# Decupant and Decupancy.

Vide Vang 100, &c. 3 Leon. 36. 6 Mod. 66. Carth. 65, 65. 2 Keb. 250.

# Oldham versus Pickering.

IMich. 8 Will. 2. B. R. 1 Ld. Raym. 96. S. C.]

IN attachment fur probibition the case was briefly thus: Estate pur auter Thomas Oldman being feifed of a meffuage in the county for the payment of Cheffer, to him and his affigns for three lives, died in- of debts, not of testate without children, leaving only Anne Pickering his legacies, unless fifter: Administration was committed to Margaret Olderspressly; nor barm the plaintiff, whom the defendant now sues in the distributable. fpiritual court of Chefter for distribution, and to exhibit vide ante 415, &c. Carth. 376. an inventory, which she exhibited and omitted thereout S. C. Comb. the estate pur auter vie; whereupon the single question 388, 475. S.C. was this, Whether an estate pur auter vie be not distribut- 3 Salk. 137.
Holt 503. Cases able in like manner, as inteleates goods and chattels are, B. R. 103. according to 22 & 23 Car. 2. by force of 29 Car. 2. c. 3. 3 D. 379. 8,30. which enacts for the amendment of the law, that an ef- 409. P. S. tate pur auter vie shall be devisable, and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as affets by discent; as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be affets in their hands.

And after a long argument by Cheshire for the plaintiff, and by Ward for the defendant, the whole Court, viz. Holt, Rakeby, Turton, and Eyre, unanimously gave judgment, That the prohibition should stand, and that an estate pur auter vie belonging to an intestate, was not distributable; for, notwithstanding this alteration by the statute, it remains a freehold still; and the amendment of the law in this particular, was only defigned for the relief of creditors; that, if it came to the heir by reason of a special occupancy, it should be in his hands assets by descent, that is, liable to the payment of those debts where the heir is chargeable, and of those only; but if there was no special occupant, then it should go to the executors or administrators, i. e. they should be in the room of the occu-Pant, and it shall be affets in their hands, i. c. they shall be bound to pay the debts of the deceafed to the value thereof; so that it is not so much as affets to pay legacies, except such as are devised particularly thereout, the statute

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making it affets only for this particular intent, to pay creditors; and no debts appearing in this case, the adminifirator is as it were the occupant, and shall not be compelled to make any distribution thereof, as he shall of goods and chattels, according to 22 & 23 Cer. 2. (a)

held, that an estate pur auter vie was sonal estate.

(a) Fide Duke of Dever v. Atkins, distributable in Chemery; and it is 2 P. Wms. 282. Witter v. Witter. 3 P. enacted by flat. 14 G. 2. ch. 20. that Was. 101. In the latter case it was the same shall be distributed as per-

Sec 1 Len 2, 76. 2 Lev. 71, 150, 245- 3 Lev. 200. 145, 288. 1 Lutu. 381, 1562. Raym. 53.

# Offices and Officers.

# Jones versus Pugh. [Mich. 3 W. & M. B, R.]

Indicial office may be granted to two; but if unless said to the 1 Vent. 296. S. C. 4 Mod. 16, 17, 19, 27. 11. Co. 3, 6. B. 4. 34 cd. pa. 131.

CASE for disturbing the plaintiff in his office of vicar general. A special verdict was found, viz. that to two; but if see the bishop of Landoff granted the office of vicar general not service, to the plaintiff and J. S. babend. conjunction & droifing. survivor. Vide enercend. per se vel sufficien. deputat'. It was objected, that 2 Mod. 95, 96. 2 judicial office could not be granted to two; for if they differ, nothing can be done: Answer, That may be said of four judges, as in B. R. and in ministerial offices, as two sheriffs: The Court held the grant good; and said, If Caies B. R. 10, an office be granted to two, and one dies, the office does Carth. 213,350. not furvive, but determines; as if two sheriffs, and one Comb. 334. dies, the other cannot : Skin. 446, 580. Com. 5. Officer, and the furvivor of them. dies, the other cannot act; otherwise if granted to two

4 RIod. 276, 277. S. C.

### Dominus Rex versus Kemp.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 49. S. C.]

King grants an office to A. durante beneplacito, and afterwards grants the fame to B. to commence

Scire facias was brought to repeal letters patent, A whereby King Charles the Second granted to the defendant Kemp the office of fearcher in the port of Plymouth. The case was, King Charles II. had granted this office to A. durante beneplacito; and afterwards by other after the death, letters patent, reciting the first, granted it to B. for life, turiender or for- to commence after the death, surrender, or sorfeiture of

4.

Afterwards B. surrendered to the king, who, in con- feiture of A. the fideration of the furrender, granted the office to the degood. 3 D. 161.
fendant Kemp, to commence after the \* death, forfeiture, p. 12. Comb. furrender, or other determination of the estate of A.

Cafes B. R. 77. Holt 419. 2 Rol. Abr. 154. Com. Officer, B.

It was objected, that the grant and patent to B. was \*[466] void, because A.'s estate, being at will, could not be fur- Cro. Car. 279. rendered nor forfeited. Also an estate of freehold cannot 6 Rep. 35. depend upon an estate at will.

Et per Cur. An estate at will in lands cannot be sur- Office at will is rendered, because it is determinable by the will of either at the will of the king, and not of party; but fuch an office at will is not properly at the will party, and may of both parties, but at the will of the king only; the party be furrendered. cannot determine his will, but by furrender; for if it be Dyer 80. b. an office of truft, a mere forbearance to execute will be an 259. a. offence, and finable; and furrender is the constant practice in such cases. So did the Chief Justices Hale and Scroggs.

adly, It may be faid forfeitable in some measure, and King's tenant at the king's tenants at will may be faid to forfeit; for in will may forfeit, and there must case of forseiture, the king will be informed by inquisi- bean inquisition. tion before he determine his will, and then upon the re- 2 Brownl. 212. turn of the inquisition the office is forfeited; but if it were an estate for life, there must be a scire faciar to repeal the letters patent.

3dly, If the king had turned out A., the grant to B. Dyer 197. b. may take effect, though not immediately, yet after the 1 And 6. tleath of A. the king shall appoint another in the time.

4thly, That a freehold of lands cannot be granted to A freehold to tounmence in futuro, or depend upon an estate at will; commence in futuro may be but a new office, or a rent de novo, may be created to com- in a rent de novo, mence in faturo, &c., for it is the creature of him that or in an office. makes it; and it is no otherwise in being than it is in 4 Mod. 280, 281 grant. And the king doth not grant a reversion, but in revertion; and that not in respect of a particular estate, but because he is pleased to grant in future.

334. Skin. 445, 530. Carth. 350.

Carth. 350. S.C.

# Gulliford versus De Cardonell.

[Hill. 8 Will. 3. B. R. S. C. Com. 1.]

N debt on an obligation; on oper the condition was, that Bond given by whereas the defendant was made deputy to the plaintiff deputy to prinin his office, if he pay the plaintiff half the profits, then, half the profits &c. The defendant pleaded the statute 5 & 6 Ed. 6. of the office, Et per Cur. This bond is not within the statute, because good. See 6 Mod. the condition is not to pay him so much in gross, but half 234, &c. 3 Keb. the profits, which must be sued for in the principal's name; 711, 717. Post.

Vol. II. for

cipal to pay him

468. Cro. Car. for they belong to him, though out of them a share is to 361. Cro. Jac. be allowed to the deputy for his service.
269. 2Vent. 79.
Comb. 356. S.C. Cases B. R. 9. Holt 506. Str. 1027.

[ 467 ] Vide Raym. 53.

### Saunders versus Owen.

[Trin. 10 W. 3. B. R.]

Custos rotulorum may appoint the clerk of the peace without 150. quære 147. Vide Noy 147, 148. Carth. 416. S. C.

I N an affize of novel diffeisin for the office of clerk of the peace of Kent, the recognitors found a special verdict, viz. That the Earl of Winchelfea, being custos rotulorum of deed. See 3 Mod. that county, made P. Owen clerk of the peace, to hold at his pleasure, by writing under his hand and seal; and, because the justices of peace at sessions scrupled to admit him upon this paper, the Lord Winchelsea came into court, and faid, I nominate P. Owen to be clerk of the peace, according to act of parliament.

5 Mod. 386. S. C. 3 Salk. a.go. Carth.416. Lil. Ent. 278 z Ld. Raym. 163, 164. Sho. 530.

And the Court held, that it always belonged to the cuftos rotulorum to nominate the clerk of the peace, but the clerk of the peace was removeable whenever the cuftor was Comb. 317. Clerk of the peace was removeable whenever the angular the Cafe B. R. 199. removed or changed; and moreover was removeable at the will of the cuftos till 32 H. 8., which makes him to continue in quousque the custos shall continue in. Now, by the late act, he is to continue for life; and though the words be, give and grant to him, yet it is only an appointment, and consequently may be without deed: That it cannot be a grant from the custos, or enure as such, is plain, because the cuffos is only at will; and he that has an office at will cannot make a grant for life, because there is no original estate sufficient to bear it; therefore this must enure as an appointment, or the execution of a power given by the statute; like a power to an executor to sell, or a tenant for life to make leases; the consequence of all which is, that this was a good appointment, though without deed; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwife, where it takes an effect out of an interest, and is to enure as a grant; for then, if it be of a thing incorporeal, it must be by decd. Held upon a writ of error of a judgment in the Common Pleas.

Whatever is to take effect out of an authority, or by way of appoinment, is good without deed.

# 5. Anonymous.

[Mich. 11 Will. 3. B. R.]

SERJEAN'T Darnell moved against the clerk of the county-court, for granting a replevin without taking a bond or surety of the plaintiss to prosecute; but the Court made

made no rule, because it was a stale cause of complaint near two years ago; belides, it was only a fingle instance; but the Court said, that when it grew into a practice, as if a sheriff constantly or frequently used to let persons at large without bail, then it is an abuse of his office, and the Court will interpose. Per Cur., Holt absente, Bring your action.

Vi. 4 Bur. 2007.

# 6. Godolphin versus Tudor.

[468]

[Mich. 3 Ann. B. R.]

SIR William Godolphin, being auditor of Wales, made a Bond by deputy deputy quamdiu se bene gesserit, who, by articles of to pay a certain agreement between them, was to have the fees, and in falary or profits, consideration thereof to pay Sir William 200 l. per annum, is good; but and fave him harmless. In debt on the bond for performout relation to ance, judgment was given against the plaintiff. Ist, The the salary or pro-Court held this an office within the statute 5 to 6 Ed. 6. six, void Vide

adly, The Court held, that where an office is within 678, 711, 177, the statute, and the salary is certain, if the principal make 6 Mod. 38, 124 a deputation, referving a leffer fum out of the falary, it is good: So if the profits be uncertain, arising from sees, if the principal make a deputation, referving a fum certain out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay, unless the profits rise to so much; and though a deputy by his constitution is in Vide H. Bl. place of his principal, yet he has no right to the fees, they still continue to be the principal's; so that as to him, it is only referving a part of his own, and giving away the rest to another; but where the refervation or agreement is not to pay out of the profits, but to pay generally a certain fum, it must be paid at all events, and such bond is void by the statute.

ante 456. pl. 3. Keb. 552,659.

N. This judgment was afterwards affirmed in the House of Lords. 1 Bro. P. C. 101.

# 7. Lee versus Drake.

[Trin. 4 Ann. B. R.]

CASE wherein the plaintiff declared, quod cum extitif- Case for diffurbfet clerk of fuch a parish, the defendant disturbed him ing him in the in the exercise of his office, and hindered him to sit in the office of parish-clerk's seat, per quod he lost the profits of his office. It was clerk. Vide objected, that this was rather a service or employment than 6 Mod. 10, 21, an office; that if it be an office, it is ecclefiastical, for of 2;3. 4 Mod.

common 228. Mo. 706.

common right the parson appoints the clerk, and the Court will not intend a custom; and unless a clerk comes in by the election of the parishioners according to custom, he has not a temporal right; and the Court will not grant a mandamus for a clerk, without an affidavit that he is appointed by the parish. 2dly, It does not appear that any sees appertain unto this office, and no action lies at common law for disturbance in the enjoyment of a seat in the church, without a temporal right; and so it is here. Adjourna-

Vide ante 435, Non-attendance is good cause of forfeiture of an office.

469] ide Hard. II. 12. 3 Lev. 290. Vaugh. 62, 64, 153. 3 Mud. 335•

# Office for the King.

### Layton contra Manlove.

[Mich. 2 W. & M. In Canc.]

ing some points well, and nothing as to others, may be fupplied by melius inquirendum ; otherwife, if defective in the points found.

Inquisition find- SEVERAL voluntary escapes being committed by Manlove the warden of the Fleet, an inquisition was found, and the king granted the faid office to Layton; an now the commissioners of the great seal resuled to. Ral the fame, being of opinion that the inquisition was void, and ought to be quashed, because it does not find what estate Manlove had in the office; for there are two sorts of inquisitions, the one to inform, and that need not be so certain, Mo. 308., the other to vest and entitle the king to grant, and that must be certain. Jones 71, 77. 3 Gro. 895. And here no certain estate is found to vest, and a melius inquirendum cannot supply this desect; for where an inquisition is desective and uncertain, that cannot be supplied by melius inquirendum; but where it finds fome points and not others, and that which is found is well found, there may be a melius inquirendum. Per Holt C. J., Pollexfen C. J., and Nevil J. (a)

2 Vez. 538. it was ruled, that finding the crown, and that a melius inquiren-

(a) In the case ex parte Duplesti, here, and in the report of this case, 3 Med. as to a meline inquirendum, is a person not an alien did not conclude considered as erroneous by Ld. Hardwicke, and Ld. Ch. Baron Parker, who dum should go. The rule laid down assisted him. A doubt is suggested as to the fidelity of the report, as Levinz is filent upon the subject. The Lord Chancellor also intimates a doubt as to the principal point, because, when no estate is found, it should be presumed that the office is held in fee. He obferved, that all that could be fenfibly

collected from the rough account of the case in the books, is a contention that the crown might avail itself of the forfeiture. A melius inquirendum is only grantable on the part of the crown, 3 Atk. 5.

# Linch versus Coote.

[Hill. 8 Will. 3. B. R.]

TENANT for life, remainder to his first son in tail, A. tenant for remainder to J. S. in fee: Tenant for life is attainted life, remainder to B. in fee; A. of high treason, and dies without issue. It was objected, is attainted. that the whole estate being vested in the king by 33 H. 8., King seizes, B. without any office finding the special matter, [the person] in may enter on the king, otherwise remainder cannot enter, for the flatute vests it in the king if an office had like a general office; and if a general office had been found A. feized found, it would have been supposed a see. Holt, C. J. in see. Vide No other estate vests in the king, by virtue of the act of 67. Fearne 427, parliament, than the party attainted had; just as if a spe- (209). cial office had been found: And therefore in this case, as in that, the remainder-man may enter on the king, his estate being determined, for the statute saves the rights of others; otherwise, where an office finds an estate in see in the party attainted, for then it must be avoided by traverse, or amoveas manum. Vide Dyer 335. b. Hob. Sheffeild and Ratcliffe, Moor 109. 3 Cro. 640. Dy. 354. pl. 230.

#### Orders of Justices of the Beace. [ 470 ]

[Vide Titles Apprentices, Bastards, Justices of the See also Burn's Justice, Peace, Poor, Sessions. under the Titles Poor, &c. &c.; and Burrow's Sessions Cases.

# I. Inter Inhabitan. Dumbleton and Beckford.

[Pasch. 7 W. 3. B. R.]

N a certiorari was returned an order of sessions in Order to remove Gloucestersbire. A girl of near thirteen years old had to B. because fabeen at Dumbleton in the faid county, and had always lived there, ill. Ante Fα there

427. Comb. 380, 381. Mod. Cases 87. Set. and Rem. 158. š. C.

there with her grandmother: Her father was legally fettled at Beckford in the fame county: She wanting relief, was by the order charged on Beckford, because her father was settled there. Et per Cur. The order must be quashed (a); for though till eight (b) years children are counted nurse-children, yet they must afterwards have maintenance from the parishes where they themselves are settled, and for any thing appears the may have gained a fettlement.

(a) R. acc. Foley 271. 1 Seff. cafe 45. Vide 1 T. R. 164. (b) The law is now feven years. Vide post. 528.

#### 2. Anonymous.

[Mich. 7 Will. 3. B. R.]

tice, the very feal need not be post pl. 4. 1 Saund. 316.

In orders to dif-charge apprentice be discharged from his master, the sta-tute requires that the discharge be under the hands and tute requires that the discharge be under the hands and discharge under seals of four justices of peace; but, in a certiorari to remove the order, it is sufficient in the return to take notice of the order so made; for it is not necessary to certify the discharge itself.

#### 3. Dominus Rex versus Randall.

Seffions cannot suppress an alehouse licen ed, S. C. Holt 405. Set. and Rem. 265.

L 471

Comb. 17.

Brownl. 296.

1 Salk. 45, 46. 1 Saund. 249. 2 Keb. 5c6. Godb. 178.

BY a certiorari two orders were removed from the fefsions of Middiesex; the first whereof recited, That unless for difor- whereas R. Randall had lately taken a house at Hoxton, deder. 3 Salk. 27. figning to fell ale and beer there; and whereas the house had never been inhabited but by merchants and men of quality, and there were alchouses enough in Hoxton already; therefore it is ordered that no licence be granted to any house in Hoxton wherein ale was not formerly fold, and that no licence should be granted to Randall. The fecond order recited, That whereas a licence was furreptitiously gotten by Randall from two justices of peace, that yet his house should be suppressed from drawing of ale: And it was moved to quash these two orders, because by 5 & 6 E. 6. c. 25., the quarter-sessions cannot control two justices of peace in this affair. Per Holt, C. J. This difference has been taken: If authority be given to two justices of peace to do an act, and from that act there is no appeal, then it may commence at the sessions; but if an appeal be given, then they cannot begin at the sessions, as 43 Eliz. and 18 Eliz. till 3 Car 2. But the true objection here is, that except for disorder the justices of peace cannot, at their fessions, suppress an alchouse licenced by two justices of peace; and the order was quashed.

# 4. Dominus Rex versus Gately.

[Mich. 7 Will. 3. B. R.]

S. C. 5 Mod. 139, 140. Comb. 353. Set. and Rem. 131.

Na certiorari it was moved to quash an order of Sef. Power to difsions for the discharge of one Edward Green from his tices, extends apprenticeship to the defendant Gately: The fact was, only to such that Gately was a mountebank, and being at a place in trader as are spe-Norksbire, where he kept a public stage, Green was by in- cially named in the statute. denture bound apprentice to him in this manner, viz. to Ante, pl. 2. S.C. Robert Gately, surgeon, to learn the trade he now useth; Carth. 198, 366. and immediately he went upon the stage, and ever since i Saund. 313 to continued in the employ; after which, being with his 174,175.

master Gately in Middlesee, he complained to the justices i Mod. 2, 286, salk. that his master did not teach him the trade, upon which 67,68. they discharged him; this being done, Green set up the trade of mountebank himself. Mr. Northey moved to quash the order, the justices being willing, because they were imposed upon: 1st, He excepted to the form of the order, that they ordered the servant to be discharged from his master, whereas the discharge should be mutual. 2dly, Because the stat. 5 Eliz. in discharging apprentices is confined, and extends only to apprentices mentioned in that clause, and there neither surgeon nor mountebank is mentioned: And though a surgeon may be a trade within the statute, which a man cannot exercise without serving an apprenticeship to, because that clause of the statute is general; yet this part of the statute, relating to the discharge of apprentices, extends only to trades there mentioned. Per Cur. As to the first, the discharge of the servant is by consequence a discharge of the master; and as to the second, the clause of the statute relating to the discharge of apprentices is general, and goes to all manner of apprentices, even to those of merchants, as it was adjudged in Hawkfworth's and Hillary's case, I Saund. 314. But afterwards the Court was of opinion, that the power of discharging reaches only to the trades mentioned in the statute, among which a surgeon is not mentioned; for that though as to the serving seven years apprenticeship, a furgeon comes under the general terms of arts and mysteries; yet the power of discharging reaches only to the trades particularly mentioned (a), and this point was not Stirred in Hillary's case; and in Watkin's case, 2 Keb. 822. Hale, C. J. was of another opinion.

(a) R. contr. Str. 663. Adm. cont. 1 Bott. 3d edit. 515.

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ed Rex verf. Inhabitants of Harwe'l. 3 Salk. 256. Set. and Rem. 266.

10. Poft. 483, 608. Comb. 286, 396. 5 Mod. 396.

5 Mod. 203, 209. S. C. call. 5. Inter Inhabitan. Paroch. Ofwell and Woking.

[Pasch. 8 Will. 3. B. R.]

A N order was made upon appeal, fetting forth, That by the order of two justices, upon a controversy before Seffions may af-firm or quash, them between the parishes of Woking and Ofwell, a poor but not superfede person was removed to Oswell, and that upon complaint of an original order, the churchwardens of Ofwell, the sessions ordered their oror make a new one. Vide Faref. der to be superseded, and that the person should be removed to Waking aforesaid; and it was objected, that the act of parliament only gives the fessions power to assirm or quash, but not to supersede an order, or to suspend it for a time; and that the case before them being for the parish of Woking, an order made by them for another parith not concerned, viz. the parish of Waking, must be void, and that the word aforesaid would not help it, because Oswell was the parish last mentioned. Per Cur. Superseding is not a proper word, for there is a difference between a fupersedens and a repeal. A commission of oper and terminer that is superseded may be revived by procedende, without granting a new commission; but that cannot be in the case of a repeal, though this word is commonly used by justices. of peace upon fuch occasions; and then there is a plain difference between Waking and Woking, for by what appears they may be two distinct parishes. But no judgment was given, for the cause was referred to a judge of asfize (a).

Ante 452.

(a) Vide 2 Str. 1168. 1 Seff. ca. prise, be made by the justices who 280. R. 1 Str. 6. That a supersedeas to granted it. an order may, on the ground of fur-

#### 6. Inter the Inhabitants of the Parish of St. Nicholas and St. Helen.

[Trin. 8 Will. 3. B. R.]

Where notice shall be presum-ed. Vide post. pl. and Rem. 192. S. C.

TWO orders were made for fettling one Rice, a poor man, the first by two justices, the other by the sef-17. 2 Lev. 22. sions on appeal, confirming the former. The fact was, Comb. 382. Set. Rice being fix years ago legally settled at St. Nicholar's, clandestinely came into the parish of St. Helen, and lived there without giving notice to the officers of the parish of St. Helen during all that time; they fent him back to the parish of St. Nicholas, &c. And the question was, Whether living in St. Helen's so long as fix years, should not induce

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induce the Court to prefume notice and other things re- 5 Mod. 454quisite well done, to gain a settlement? Et per Cur. No person, that is not a removable person, is to give notice; as he that rents a tenement of 10 l. per annum, a servant, &c., need not give notice, because they cannot be disturbed: In this case, if it had appeared upon the order, that the parish of St Helen had taken notice of him, and looked upon him as one of the parish, as by relieving of him, making him an officer, &c. there, after so long a time, we would have prefumed notice given, because the notice need not be exactly proved; for the churchwarden to whom it Vide post. pl. 17. was given, and the witnesses attesting the matter, may be dead; but here it is returned on the order, that he clandestinely removed himself, so that he might easily continue in the same manner; wherefore in such cases we must construe the statute strictly; and therefore the order was confirmed.

### 7. Inter Paroch. Trobridge and Weston.

[Mich. 8 Will. 3. B. R.]

5 Mod. 325. S. C. Set and Rem. 244. Holt

T was moved to quash an order of two justices, which Informed that recited, Whereas B. is, as we are credibly informed, the B. is the place place of bis legal fettlement, not averring that it was the place of legal fettlement, ill. Vide of his last legal settlement, as it ought; for that the statute post. pl. 23, 26, fays, the poor person shall be removed to the place where the Comb. 413. be was last legally settled; and it was quashed.

Note: Mich. 3 Ann. B. R. it was held, that legal fet- Set. and Rem. tlement, and last legal settlement, are the same thing, be131. Str. 73. caple by every new fettlement the precedent is discharged.

# 8. An onymous.

[Mich. 8 Will. 3. B. R.]

AN order was made by two justices to remove a poor Removing need person, and exception was taken, that it did not ap-not be by justices of the division. pear by the order that the justices were of the division, or Post. pl. 30. that either of them was of the quorum: The last was held Comb. 285,400, a good exception (a,) but the first over-ruled, for in that the statute is only directory.

(a) By flat. 26 G. 2. c. 27. No or- ing that one of the justices is of the der shall be set aside for not expressquorum.

5 Mod. 321, 332. S. C. 9. Inter Inhabitant. Chittinston and Penhurst.

[Mich. 8 Will. 3. B. R.]

One justice for of the quorum. Vide 6 Mod. 280. 5 Mod. 349, 162, 208, 321, 322, 325, 330. L 474

One justice for removal of a poor person was quashed, besemoval must be cause it was not faid that one of the justices was of the quorum. Holt, C. J. said, This had been doubted, and perhaps adjudged otherwise before; but that he was of a different opinion; for this being a special authority, it must appear to be pursued (a).

(a) Vide note to preceding case.

#### Dominus Rex versus Dobbyn.

A N order of two justices was quashed, because it did not appear they were justices of the county, or for the Tuffices refiding in the county, not enough. S. C. 5 Mod. county, but only residing in the county.
329. called Rex
ver. Turner. Vide post. pl. 16 & 34. 2 Sess. Ca. 76. Bur. Set. Ca. 23.

# 11. Dominus Rex versus Turnock.

[Mich. 8 Will. 3. B. R.]

Orders made upon 43 El. c. 2. must be at the quarter-fessions. S. C. Comb. 418. by the name of Rex v. Charnock.

INDICTMENT for refusing to relieve and maintain Eliz. the wife of his fon John Turnock, according to an order made in the fellions; which order was let forth in the indictment in hec verba, viz. Ad generalem sellion. pacis tent. apud Marlb. in & pro com. Wilts, &c.; and, at the motion of Mr. Eyre, the indicament was quashed, because the order was only faid to be made at the general fessions, and not at the general quarter-sessions; for the quarterfessions are appointed by 2 H. 7. c. 4., though it appears by the same statute, that there may be a general sessions at other times; and 43 Eliz. c. 2. f. 7. appoints orders in these cases to be made at the general quarter-sessions.

#### Inter Inhabitan. of Much-Waltham and 12. Peram in Essex.

[Mich. 8 Will. 3. B. R.]

Set. and Rem. 274. S. C. Baf-tard born pend. MR. Comyns moved to quash an order of sessions for the settlement of a bastard-child of E. L. She being big tard born pending an illegal or- with child, a little before her delivery was removed, by the

order of two justices of peace, from Much-Waltham to der of removal Peram; before the next sessions she was delivered at Pe- from A. is set-tied in A. Vide ram of a bastard-child. At the sessions Peram appealed, 1 Salk. 121. and the justices adjudged the woman to be legally settled Post. 485, 528, at Much-Waltham, and ordered her to be sent back thi213. Bulst. 349. ther; after which an order was made for fettling the child Carth. 397. at Peram, which Comyns moved to quash, because, though 5 Mad. 204. regularly bastards must be maintained where born; yet in this case, where there seems to be a contrivance, it shall not be so, as in Tuming's case, 2 Bul. 349. Whensoever an order is reversed, all things happening subsequent thereunto, shall be avoided thereby: This child being born pending the order, shall be esteemed in law to be born in that parish whereunto the mother on the appeal is returned back. The Court seemed to agree to this; and a rule was made to shew cause, but none was shewed.

#### The Case of the Parish of Amner-

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[Mich. 8 Will. 3. B. R.]

THE case was, at the complaint of the churchwardens Sessions on apof Terrent-Keinston in Dorsetsbire, to Sir John Morton peal cannot fend and John Gould, two justices of the peace of the said coun-not party. Post. ty, concerning a poor man and his wife; they the faid pl. 20, 25, 32, justices adjudged him to be last legally settled at Tirrin45, and 58. S.C.
Set. and Rem. Crawford, upon which they appealed; and there it was 268. ordered, that it appearing to the sessions that he was last fettled at Amner, therefore they discharge Tirrin-Crawford, and order the poor man to be removed to Amner: This was quashed upon the motion of Mr. Serjeant Gould, Comb. 285. because this was to make an original order, which the justices at fessions have no power to do; they might have reversed the first order, and ordered the party to be carried back to Terrent-Keinston, but they could not remove the party to Amner, a third parish, who was no ways concerned in the order or appeal; and if they are really chargeable with it, it must be at the complaint of Terrent-Keinfon to two justices of the peace.

#### Inter the Inhabitants of the Parish of 14. Chittinston and Penhurst.

[Mich. 8 Will. 3. B. R. Vide ante. pl. 9.]

Norder was made to remove a poor person from Chit- Authority given tinston to Penburst, and this was quashed, because it to judices of the was not faid that one of the justices was of the quorum. exactly pursued.

507.

Vide Farell. 99. Holt, C. J. faid, that some indeed had been of opinion that Mod. Cases 99. an order was good, notwithstanding this omission, and S. C. 5 Mod. an order was good, notwithitanding this omilion, and 321. Set and perhaps it has been so adjudged; but he was of opinion, Rem. 271. Holt that this being a special authority to justices out of sessions, it ought to appear that that authority was exactly purfued.

# 15. Dominus Rex versus Matthews.

[Hill. 8 Will. 3. B. R.]

bastardy, the reputed father must be present in court. 6 Mod. 180. 1 Bl. Rep. 398.

Upon motion to M R. Montague moved to quash an order for maintain-quash an order of M ing a bastard-child: 1st, Because it was not said the ing a bastard-child: 1st, Because it was not said the child was likely to become chargeable: And, 2dly, The defendant was ordered to pay 18 d. per week indefinitely, without limiting any certain time. Shower answered, that no order relating to a bastard-child can be quashed, except. the reputed father be present in court, quod Curia concessit; however this being a hard case, a rule was made to thew cause; and being stirred again the next term, the Court would not quash it till the reputed father came into court; and the first exception was over-ruled; for it is self-evident that every bastard-child is likely to become chargeable.

#### 16. Purnall's Cafe.

[Hill. 8 Will. 3. B. R.]

Rem. 140.

Vide 5 Mod.
329. Ante, pl. A N order upon H. for maintaining his daughter, was quashed, because it was recited to be made ad gene11. Post. pl. 34.
5. C. Set. and ralem sessionem pacis, and not ad quarterialem sessionem pacis, according to the statute 43 Eliz. c. 2.

#### Inter The Inhabitants of Talbury and 17. the Hamlet of Foston in Scropton.

[Hill. 8 Will. 3. B. R. S. C. Foley, 123.]

In writing to make a fettlespecified in 3 & 4 W. & M. c. 11. Ante, pl. 6, Comber. 382. 5 Mod. 454.

Nothing will amount to notice A N order was made by two justices of the peace in amount to notice A Derbysbire, to remove Robert Floud to Foston in the parish of Scropton. Upon appeal the first order was ment that is not quashed, and the party ordered to be removed to Talbury, and the matter of fact being now stated specially to the Court; the case was,

Floud was born in Talbury, and ferved feven years apprenticeship there, which ended in the year 1693, since 1693 he lived in Feston and other places out of the parish of Tak-

bury,

bury, and the blacksmith that lived at Foston dying, and the inhabitants wanting one, in 1694 Floud went thither, and rented the shop and a chamber of the widow of the former blacksmith for a year, at 52 s. per annum, with the consent of the bailiff of the lord of the manor: Here he worked publicly, was publicly employed by the parishioners, and particularly by the bailiff of the lord of the manor, the vicar, and the justice of peace; and now having never given notice, nor rented a tenement of 10 L per annum, or exercised any office, the question was, Whether this public way of living was not tantamount and equivalent to notice in writing, which was only defigned to prevent claudestine entries and livings. Et pur Cur. This public notice taken by the parish might perhaps have satisfied the statute 1 Jac. 2.; but there being doubts Carth. 28. concerning the notice prescribed by that act, the 3d and 4th W. & M. c. 11. was made to explain it, and this latter statute hath particularized the notice, and what shall be tantamount to it, and what not (a); but this is not among the particulars of the statute; for which reason the order was confirmed.

(a) R. acc. 2 Bett. 3 ed. 124. Feley 110. Str. 835. Poft. 534.

# Hatton's Cafe.

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[Hill. 8 Will. 3. B. R.]

AN order was made by five justices to maintain a Order of bastardy bastard-child; and it was objected by Broderick, under the hands that the complaint is not said to be by any parish or officers of more than two justices, well. there, but only of a town which may include several Post. pl 22. parishes; but the Court held that well enough. 2dly, Mod. Cases 180.

That the order is under the hands of five justices, whereas Rem. 272. it should be only the two next; but the Court held that well, for the statute is not restrictive to two, but there must be two at least. 3dly, That it does not appear that either of those was a justice of querum; upon this it was quashed, but the party was bound to appear at the next leftions.

Inter Inhabitan. Cockfield and Boxstead.

[Hill. 8 Will. 3. B. R.]

ANNE Talby was by order removed from Cockfield to Seffions. Comto Boxfead; and this order being appealed from, was ber. 418. S. C. confirmed at the sessions; but the sessions after that made Sett, and Rem, an order of review, and quashed the former order of ses-

#### [ 477 ] Orders of Judices of the Beace.

fions, because made by surprise. Et per Cur, The order of review must be quashed; for the justices have no power after the first sessions.

# 20. Dominus Rex versus Harding.

[8 Will. 3. B. R.]

be determined by another. Ante pl. 13. Post pl. 22. S. C. Sett. and Rem. 269.

Seffions cannot A Certiorari was directed to the lord mayor and justices of peace of London, to remove an order, before filing whereof a procedendo was prayed: the fact was, the fervant of one Harding complained to the fessions, that her master was in arrear to her for wages: on hearing the matter, both parties agreed to refer it to Sir Thomas Lane, late lord Mayor, to be determined; which was done accordingly by order of sessions: He made an award or order, but before report made thereof, this certiorari was now brought, whereon a procedendo was now prayed. Et per Cur. A judge of nifi prius, by consent of parties, may make a rule to refer a cause, but the sessions cannot do so, though by consent (a): They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other; and therefore the certiorari was filed, and no procedendo granted.

(a) Vide Stiles 154. Cald. 30. 5 T. R. 279.

#### [478] 21. Inter The Inhabitants of the Parish of St. Mary le More and Heavy-Tree in Devonshire.

Settlement by payment of arish rates. Vide post 523. pt. z. and pag. 536. 1 Show. 12. Comb. 284, 410. Mod. Cafes 38.

FACY was settled at Heavy-Tree, and afterwards went into the parish of St. Mary le More in Exeter, and took a house there of one pound per annum, wherein he lived a year and a half, and paid the rates and taxes due for the faid house; and the justice at sessions held, that the rate for a house, without a rate on his person, was not sufficient to make a settlement (a); but the Court of King's Bench quashed this order for this cause, and held him settled at St. Mary le More.

(a) Vide 8 Mod. 38, Bur. S. C. 465. between him and the public. Per Cur. 73, 522, 627. Cald. 103, 276, 365. Rex v. Rainbam, 5 T. R. 240. The 2 Conft. 233, Per Lord Manifeld, in fessions must decide the fact, whether Rex v. St. Laurence, Cald. 379. The the rate is upon the landlord or the occupier must be presumed to be rated, against whom the first remedy lies, as

### Dominus Rex versus Beard.

A N order made by two justices of the peace in Suffex, Order of bal-tardy ill, because adjudged Beard to be the father of a bastard-child, examination by which was quashed, because it appeared thereby, that the one justice only. examination of the woman was by one justice only, Ante pl. 8, 10, though the ordering part thereof was faid to be made Post. pl. 34. by both (a); and Beard was bound over to the next feffions.

(a) R. sec. 6 Mod. 180. Vide 2 Bl. Rep. 1017. And. 238.

### Inter Inhabitan. St. Giles Cripplegate and Hackney.

[Pach. o Will. 3. B. R.]

TATHEREAS complaint has been made to us, that Place of last Elizabeth Fulford, wife of Uriel Fulford, is lately legal fettlement must be adjudgcome into the parish of St. Giles Cripplegate, and is likely ed. Vide ante to become chargeable to the same; and whereas, on oath pl. 7. post pl. made by the faid Eliz. Fulford, it appears that her huser husers had been was last legally settled at Hackney; these are thereib. Comb. 413. fore, &c. Quashed, because there is no judgment of the Doug. 662. justices concerning the last legal settlement, but only the (637.) Str. 73. oath of the woman.

# Dominus Rex versus Barebaker.

[Pasch. 9 Will. 3. B. R.]

RDER upon H. adjudging him to be the father of a To maintain his bastard-child, and ordering him to pay 3 s. per week bastard till the till the child attain the age of fourteen years, was held age of fourteen, naught; for they have no authority but to indemnify the 1 Vent. 210. parish, by obliging him to maintain the child as long as it 2 Keb. 23.

Comb. 320,
321. S. C.

Ante 121. Black. 234. Set and Rem. 145.

(a) R. That order to pay till nine years old is good, 2 Str. 788.

25. Anonymous.

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[Pasch. 9 Will. 3. B. R.]

A N order made by two justices of the peace for settling Where the set-a poor person, was quashed by the sessions; but be-sorder, it must cause it did not appear that it came before them by way appear to be on

sppeal. Ante of appeal, without which they have no jurisdiction, this by the name of order of sessions was quashed (a). Jerricon's Case, Comb. 445. Set. and Rem. 176. Skin. 671. 5 Mod. 328. Cases B.R. 132.

(a) Vide Comb. 133. Bur. S. C. 276.

#### 26. Inter The Inhabitants of Berry and Arundel.

[Paf. Q Will. 3. B. R.]

Want of adjudiention of last legal settlement. 5 Mod. 325, 397. Comb. 413. S.C. Set. and Rem. 257. Doug. 662. (637). Str. 73.

HEREAS complaint hath been made to us, that Jacob Duckin with his wife and children, came Post. 491, &c. from his place of abode and last legal settlement in Berry.

1b. & ante pl. 7. to Arundel: we therefore require you fee naught. to Arundel; we therefore require you, &c. naught; for there is no adjudication of the justices, which was his last legal settlement, but only a complaint, that Berry was, which doth not appear, whether true or false.

#### Elizabeth Ashley's Case. 27.

[Trin. 9 Will. 3. B. R.]

Return by the clerk of the peace, ill. Vide Pa. 431, 699, 701. S. C. Set. and Rem. **2**59.

T. WO orders were removed by the state of the fedule turn was quashed; because the return in the schedule annexed to the writ was not made by two justices, but by the clerk of the peace, who was not the person to whom 3 Salk. 268. Case B. R. 138. the certiorari was directed, and thereupon a new certiorari was granted.

#### 28. The Case of Chesterfield.

[Trin. 9 Will. 3. B. R.]

the fervant not being party, makes no aprenticeship. Post 533. S. C. Skin. 671. 5 Mod. 308. Carth. 400. Comb. 445. Cafes Br. 132. Vide Cald. 31.

Covenant be-tween the mafter and third person, J Waltham; afterwards he left his service and was put out, by his master Sir Paul Jenkinson, to a barber in Chefterfield, who was to teach him to shave and make periwigs, for which he was to have 51. from Sir Paul. Jerrison continued a year in this employment, according to covenants between Sir Paul and the barber, to which Jerrison was no party; and the Court adjudged that this did not make a settlement at Chesterfield, because it was no service a and that the said Jerrison was thereby no more than a boarder there for his education, which is no service to make a fettlement.

### 29. Dominus Rex versus Brown.

[Trin. 9 Will. 3. B. R.]

A Norder was made, adjudging Brown to be the father Appeal from orof of a bastard-child, May 2, 1696: And in the Michaelmas sessions following the said order was discharged. Estimates for sessions after Now both orders being here, the latter was quashed, because notice to the fait it did [not] appear thereupon, that Michaelmas sessions was there, of the sist order. Ante, the first sessions after notice given to the reputed father of pl. 17, 16. Post. his being so adjudged; for though 18 Eliz. appoints the pl. 34. Comb. appeal not to be to the first sessions after the order of the 448. S. C. two justices, but the first [general] sessions after the party hath notice of the faid order; yet by the statute of H. 5. 2 H. 5. c. 4. there might be a sessions intervening, as in this case, between the order by the two justices and the order of seffions; and it must appear on the order that this was the first [general] sessions after notice had of the former order: After which the first order by the two justices was quashed, because there was an adjudication therein, that the reputed father should pay a certain sum weekly, till the child be of fevera years of age; whereas they cannot charge the father for a my certain determinate time, but as long as the child shall be chargeable to the parish.

# 30. Elizabeth Ashley's Case.

[Trin. 9 Will. 3. B.R.]

CEPTION was taken to an order of two justices, Justices need not to remove, &c., because it was not said that the two the division. justices were of the division, according to 13 & 14 Car. 2. Ante, pl. 8 Sed reon allocatur; for the Court held the statute as to this Comb. 285,400. to be only directory, and not restrictive or qualificatory, as 5 Mod. 322. that of the quorum is.

#### 31. Inter The Inhabitants of Dimchurch and Eastchurch.

[Hill. 9 Will. 3. B. R.]

An order was made at the quarter-fessions originally, Order for maketting forth, That whereas the parish of Dimchurch ing one parish contributory to the poor of another description of the poor of another descriptions. had no poor, the parish of Dimchurch should be annexed ther. Comb. to the parish of Easlichurch, and that the occupiers of lands 242, 309. S. C. VOL. II. there

#### Orders of Julices of the Peace.

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Set. and Rem. there should contribute 20 l. per annum, by equal monthly

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221. Holt 573. payments to Dimchurch, as long as that was overburdened I Str. 56. 2 Str. with poor, and Eastehurch had none: And it was objected 1144. Comb. by Mr. Brewer, that the justices of peace cannot alter parishes and annex one to another. 2dly, That the sessions cannot make an original order (a). Per Holt, C. J. There are two ways by 43 Eliz. to make one parish contributory to the poor of another parish, viz. either the justices may tax particular persons in aid to that parish which cannot Skin. 258,259. relieve its own poor; or they may affess the whole parish in a certain sum, and leave it to the churchwardens and overseers to levy the same, or particular persons, which was well done in this particular case; but so much of it as concerns the annexing of the parishes is void, and the rest good. But the Court took time to advise.

5 Mod. 397.

- (a) This was ruled, Comb. 25. 5 Mod. 397. Foley 32.
- Inter Inhabitan. Paroch. Downhead and Broadchalk in Wilts.

[Hill. 9 Will. 3. B. R.]

After order confirmed on appeal, if the person goes to a parifh not party, he must be removed by original order. Vide ante, pl. 33, 20, 25.

TWO justices of the peace made an order to remove John Rainsford, his wife and three children, from Rowborough in Somerfet/bire, to Broadchalk in Wilts, which order, on an appeal to the quarter-sessions, was confirmed; after this Rainsford, with his wife and three children, came into the parish of Downhead; whereupon two justices, reciting the former order and confirmation, ordered him to Broadchalk: And now it was objected to this order. that it did not appear that one of the justices was of the quorum. Mr. Northey on the other side argued, it was not necessary here, because it was not an original order, but an order made in pursuance of an order of sessions. Et per Cur. A fettlement, by order upon appeal, binds all parties: If the poor man goes to the parish from whence he is removed, the sessions must see their order obeyed; but if he goes to another parish not concerned in the appeal, then it is proper for two justices of the peace to remove him to the parish where he was settled by the sessions by original order; but then it must appear therein that one of them was of the quorum (b). Quashed.

(b) By flat. 26 G. 2. c. 27., this is no ground for reverling an order.

### 33. Inter Inhabitan. King's Norton in Wigorn and Swolhill in Warwic'.

[Hill. 9 Will. 3. B. R.]

A N order was made to remove a poor woman from Yarly Order of two in Worcestersbire, to Swolbill in Warwicksbire; after- against all pawards two justices in Warwicksbire made an order to re- rither, till remove her to King's Norton in Worcestersbire; whereupon Pealed. Vide two justices of Worcestersbire sent her back to Swolbill; 52. 5 Mod. 416. and upon an appeal to the sessions in Warwick/bire, the Justices confirmed her settlement at King's Norton, and then an order was made by two justices of the peace to execute the said order: All these orders being brought up by cestierari, Carthew moved to quash all except the first, all the others being made coram non judice; for when an onginal order is made, it binds all persons until it be set alide, and it cannot be set aside but on appeal to the ses-Mr. Northey, on the other hand, insisted, that though in this case two justices could not send the woman back again to Yarley, yet they might send her back to a third place, as King's Norton is in this case; so that as to King's Norton it is but an original order; but the Court seemed to be of another opinion, for then King's Norton might fend to Yarley, and there would be a perpetual circuity; but seeing in this case King's Norton had appeared at the fessions, and had been concluded there, they would not quash the order; and several other questions arising, all was referred to a judge of affize.

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#### Dominus Rex versus Shaw. 34-

[Trin. 10 Will. 3. B. R.]

A N order was made by two justices of the peace, adjudg-Appeal from oring Shaw to be the reputed father of a bastard; whereapon he appealed to the next quarter-fellions of the peace, general fellions. after notice, where the order of the two justices was dif- Ante, Pl. 11, charged; and now it was here moved to quash the order 16, & 29, & of feffions, because by the statute the appeal must be to the s. c. next general fessions, and there might have been a general Carth 455. Set. feifions before the general quarter-fessions, as in London Cases B. R. 203. and Middlesex, where there are four general sessions in a fear, belides the general quarter-sessions (a). Quashed

(a) R. cont. 3 T. R. 496.; and said pear to be one of the most accurate in Mr Cariam, that this case does not ap-

#### 35. Anonymous.

[Mich. 10 Will. 3. B. R.]

Order to remove A. and his family, ill for ge-Comber. 478,

A N order made to remove three men and their families was quashed, quia too general; for some of their faneralty. Post. pl. mily might not be removeable. If a man settled at A. 1. Farefi. 54. marries a poor woman who is settled at B., and has chil-479. Post. 528. dren by a former husband; his wife shall be removed with him to A., but her children, such of them as are above feven years old, shall not be removed; those under shall be removed, but that only for nurture; for they shall be kept at the charge of the other parish: But such a general order fweeps all away.

Vile Str. 114. Foley 278.

### 36. Anonymous.

[Mich. 10 Will. 3. B. R.]

First order failing, all tubiequent fall to the ground.

DER Northey, it was fettled in the case of Woston-Baffet, that if the first order be naught, no subsequent order on an appeal can make it good. Hill. 11 W. 3. B. R. Same rule was taken by Holt, C. J. and both orders quashed; and Trin. 2 Ann. the same resolution between Selon and Ripley.

#### [483] 37. The Case of the Parish of St. Leonard Shoreditch.

[Mich. 10 Will. 3. B. R.]

On appeal frem a poor's rate the testions may quash the

Carth. 58.

Vide 4 Bur. 1460. 5 Bur. 2634. Cowp.

THE churchwardens, &c. made a rate for relief of the poor, which was confirmed by two justices, and therein nothing was taxed for the personal estate, but all whole and make, upon the real, which was erroneous. Several inhabitants wardens, &c. to appealed to the fessions, and the rate was there quashed: make a new rate. and the churchwardens, &c. ordered to make a new Vide ante 4-2. rate, upon both real and personal estates: In the new rate and Rem. 236. there was still a great inequality, the real estate being taxed S. C. Holt 508. ten times more, in proportion, than the personal estate; Cases B. R. 211. for this reason several inhabitants appealed again, and this rate was likewise vacated by order of the sessions. And now Northey and Shower moved to quash these orders. urging, that the fessions could only relieve particular perfons over-rated or grieved, but could not fet afide whole rates at once. Sed per lot. Cur. viz. Helt, Rokeby, and Turton: Surely the justices at sessions, upon an appeal of particular

particular persons grieved may, if they see cause, set aside 425,550. St. 17 therate; for the act is, that if any person or persons find G. 2. c. 33. themselves aggrieved, it shall be lawful for the justices at the quarter-fessions to take such order therein, as by them shall be thought convenient. 43 Eliz. c. 2. fect. 6. And in either of 11 fessions set these cases, of the first or second rate, the justices could not afile a whole have given relief without fetting afide the whole rate, be- make new one; cause the rate was burthenseme to a whole set of men: and they may make a new rate themselves (a), or order the churchwardens and overfeers to make a new rate, as was done in this case; they having it in their discretion to Or refer it back make a new rate at fessions, or remand it to the churchwardens, &c. to make one. The orders were confirmed (b).

(a) The sessions cannot make an Original rate, Rex v. Aberford East, <sup>2</sup> Ld. Raym. 798.

(6) Where an objection is against the general rule and proportion of the rate, the fessions, upon deciding in favour of the objection, should quash the race, Rex v. Sandwich, Doug. 562. Cald- 105. Where the sessions hold

a rate bad, because particular persons are not inferted, they must quash the rate, and cannot amend it, Rex v. Maddem, 1 T. R. 625. Rex v. St. Agnes, 3 T. R. 480. Where an appellant is overcharged, the sessions may relieve him by lessening his rate. Rex v. Cheshunt, 2 T. R. 623.

#### Dominus Rex versus Albertson **38.**

S. C. Carth. 469. Holt 507.

[ 1 ich. 10 Will. 3. B. R. 1 Ld. Raym. 395. S. C.]

AN order was made, reciting, Whereas it appears to us, Child born of a two justices of the peace, that Mary Spencer, wise of feme covert, the Jonathan Spencer, mariner, was on the 20th of March sea, from before 1695 delivered of a male bastard-child, which is likely to the time of bebe Chargeable, &c. And whereas it appears to us, that getting to the the faid Jonathan Spencer was employed on board the ship tard; but that called the Pembroke, in his majesty's service at Cadiz, and must appear in was not within the king's dominions when the faid child order. was begotten, or born; and whereas it appears that Al-29, 34, &c. berison had carnal knowlege of the body of the said woman, 5 Mod. 419. during the absence of her husband, and that he begat the faid child; we therefore adjudge him to be the reputed father, and to pay weekly, &c. And the faid order being confirmed upon appeal, was brought here by certiorari. And now Shower and Upton moved to quash these orders, because 18 Eliz. c. 3. gives the justices power only to meddle with bastards born out of lawful matrimony; so that though this child should be a bastard, yet the justices cannot meddle with it, because he is born in lawful matrimony: But it does not appear in this order that this child was a bastard; for it is only said the father was absent when the

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child was begotten or born, in the disjunctive; also it doth not appear but the husband was in England during the time intermediate between the begetting and birth. Per Cur', He is a bastard who is born of a man's wife while the husband, at and from the time of the begetting to the birth, is extra quatuor maria: In case of real action by him, the tenant may plead general bastardy; and on a writ to the bishop, he will certify him to be a bastard; being then a bastard as to discent, there is no reason why he should not be a bastard as to all other intents, and in particular a bastard within 18 Eliz. which is a remedial act: Also when a child is born in adultery, he is born out of the limits of lawful matrimony, the law then taking no notice of the husband; and so, though we must quash this order, because it does not appear that the husband was extra quatuor maria, during all the space of time intervening between the begetting and the birth, yet we hope care will be taken to make a new order without this fault (a). Quashed. But the defendant was bound over to appear at the sessions.

(a) Non-accels may be proved, though both husband and wife are infra of filiation made thereupon, Str. 1076. flances. 4 T. R. 356.

And it is not necessary that non-access should be proved by positive testimony, quatuer maria, Str. 925.; and an order but it may be collected from circum-

#### The Case of The Churchwardens of 39. Topsham.

[Hill. 10 Will. 3. B. R.]

Juffices may make an order, that the last overceeding what remains in their hands. Vide 531, 533.

THREE justices took the account of the churchwardens, &c. of Topsbam, for the year 1607, and adfeers pay the fuc- judged that there was thereupon due from them to the parishioners of Topsbam, 691. 18s. 10d., for the repayment whereof to the succeeding overseers for the year 1608, post. 524, 525, the justices made an order; to which it was excepted, that the justices had no power to make such order, but only to issue warrants to distrain; but the Court ruled the order to be well made, and confirmed the same.

#### Dominus Rex versus Gregory. 40.

Wages. 5 Mod. A N order was made by the justices of peace for the de-arg. Set. and fendant to pay 40s. for wages generally; and because it was not said for what wages, it was moved to quash it; for they can only settle wages in husbandry: But per Cur., We will intend it for such wages, since the 3 T. R. contrary does not appear.

### The Case of Sylvanus Johnson.

THE justices of Sussex, on complaint that y. was come into the parish of Brood, in the said county, and was likely to become chargeable to the said parish, and adjudging 35. Vi. Far.

Sandbers in Kent to be his last legal settlement, ordered that 74. Comb. 478. Cases B. R. 553. THE justices of Suffex, on complaint that J. was come To remove his into the parish of Record in the faid country, and was wife and family Johnson, and his wife and family, should be removed to Sand- S. C. herst, which was quashed; because non constat what is meant by his family, and some of them may have a legal Str. 114. Foley settlement at Brood, though J. had not.

# Christ's Hospital's Case.

[Trin. 11 W. 3. B. R.]

Poor child was tert in Corye a Charles and proposed in complaint of the wardens of the hospital, two just Christ Church tices made an order on the overseers of the poor of the Hospital. Set. and Rem. 53. Poor child was left in Christ's Church Hospital; upon dropped in Parish, to receive and maintain the child; but this order and Rem. 53. S. C. was quashed, because it was not said, that the parents were unknown, or likely to become chargeable to the Parish: For though a child of three months old be helpless yet the parents are bound to provide for it. As to the principal matter which was hinted, viz. That the hof-Pit = I was bound to provide for poor children there expoled, the Court thought there was nothing in that.

Inter The Inhabitants of St. Nicholas, uilford in Surrey, and Killington in Suffex.

[Trin. 11 Will. 3. B. R.]

ORTHEY moved to quash an order of two justices Bastard settled to remove a woman and her bastard-child from A to where born. Vide ante 427, whereas it appeared in the order that the child was 482. Post. 528, bor at C. Holt, C. J. The bastard must be kept where 532. Holt 509. it is born (a).

Though bastards are settled on the parish where they are settled, to where born, they must be removed pay money for their support and mainwith or to the mother for nurture, while under seven years old, 2 Seff. Gaf. 89. And an order may be made

tenance to that where they refide for nuture, Cald. 6. Vide Doug. 9.

### 44. Inter The Inhabitants of the Precinct of Bridewell and The Parish of Clerkenwell.

[Hill. 11 Will. 3. B. R.]

tion to icmove poor persons to or from extraparochial places. But note; In the case of The Inhabitants of Stokeiane and Dolting, Hill. 11 Ann. B. R. it was adjudged and the whole Court, that by

Carth. 515.
S. C. Holt 575, A Special order of sessions was, That H. was bound apprentice, Justices have no jurissics within the precincts of Bridewell, and afterwards he lived nine years in Clerkenwell parish, but gained no settlement there: The justices sent him to Bridewell as his last legal fettlement, by an order which fet forth Bridewell to be an extraparochial place. Et per Holt, C. J. If a place is extraparochial, and has not the face of a parish, the justices have no authority to fend any man thither; and so it was resolved in the case of Sir John Osborn: Possibly a place extraparochial may be taxed in aid of a parish, but a parish by Parker, C. J. shall not in aid of that. This is casus omissis. This order was quashed.

wirtue of 13 & 14 Car. 2. cap. 12. fect. 21. the justices may exercise the powers given by 43 EL and that act, in all extraparochial places, containing more houses than one, so as to come under the denomination of a vill or township. Pott. pl. 48. Vide post. 487, 501. 2 Lev. 142, 143. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

#### Inter The Inhabitants of St. Michael 45. Bedenham and Kingston-Bowsey.

[Hill. 11 Will. 3. B. R.]

Order of reverful on appeal binds not a third parifh, not party. Post. pl. 58. & Pag. 524, 527. Ante, pl. 11, 13, and Rem. 275.

H. Was fent by order of two justices from St. Michael Bedenham to Kingston-Bowsey, and that order was reversed upon an appeal to the sessions: Then the man went to Bedenham, and Bedenham sent him to D.; and a motion was made to quash this order, because the order 50, 25. Carth. of reverial upon the appear as to Emglion-Dougly was \$16. S. C. Set. conclusive against all the world. But the Court held, of reversal upon the appeal as to Kingston-Bowsey was That the determination upon the appeal between other parties ought not to bind as to a third parish which was no party (a).

(a) Vide acc. Bur. S. C. 17, 425.

### 46. Anonymous.

[Hill. 11 W. 3. B. R.]

Special order ought not to conclude to the opinion of the Court

AN order of fessions drawn up specially, in order to have the opinion of the Court, was concluded; and if the Court should be of opinion, then, &c. which was held naught:

naught; for the justices ought to determine one way or other, and not make a special conclusion, referring to the Court; but it was referred to the judge of affize.

[487] Inter Inhabitan. Paroch. Eaton-Bridge and 47-Inhabitan. Paroch. Westram in Kanc.

[Hill. 11 W. 3. B. R.]

AN order was made at the quarter-fessions for the re- Poor prisoners. lief of poor prisoners in gaols, and providing materials to fet them at work, upon the statutes of 14 Eliz. 6. 5- and 19 Car. 2. c. 4, whereby a fum was affested on the Teveral parishes, not exceeding what is allowed by both acts; but the order was quashed, because they ought to have made distinct orders upon the different statutes, the money to be levied by virtue of each statute being applicable to different purposes (a).

- (a) The stat. of Eliz. is the general Cha. is for the relief of persons in att for parochial relief. The stat. of gaol, by a charge on the county.
- 48. Inter- The Inhabitants of the Forest of Dean and The Parish of Linton.

[Trin. 12 W. 3. B. R. S. C. Foley 97.]

H Lived ten years in the forest of Dean, and then Extraparochia died, and left several children: Two justices made places. Vide an order to remove them to Linton in Herefordsbire. Et Holt 575. S.C. per Holt, C. J. If a place be a reputed parish, and have churchwardens and overfeers of the poor, it is within 43 Eliz. though in truth it be no parish; but if it be merely extraparochial, as the justices cannot send to such a place, so they cannot send from it: As it is exempt from receiving, so it shall not have the benefit of removing, for they have not proper persons to complain. Persons in extraparochial places must subsist on private charity, as all persons did at common law before 43 Eliz. which enacts, That every parish shall keep their own poor; in consequence of which the jurisdiction of removals was first set up before the statute 14 Car. 2. For, unless the poor were removed to their own parishes, every parish could not maintain their own poor. But the statute of 43 Eliz. does not extend to extraparochial places. Gould, J. started <sup>2</sup> question, If the justices of the county, where the parish Wherein he was last legally settled lies, might not make an

order upon the parish to make a rate for the Rief of this poor man in the extraparochial place, because not having gained a fettlement there, he remains an inhabitant of that parish still, else the man may be starved for want of relief? Holt, C. J. Quash this order, and then go and get an order: Forasmuch as H. was settled in the parish of Linton, and is not able to provide for himself: These are, &c.

#### Inter The Inhabitants of Chalbury and **[** 488 ] 49. Chipping-Farringdon.

[Trin. 12 Will. 3. B. R.]

order is made, cannot remove till that be re-yerfed. Vide ante, pl. 31. Post. pl. 52.

Parish, upon whom an original H. Was removed by order of two justices, from the parish of A. in Warwicksbire, to Chalbury in Oxforsbire; from thence, by order of two justices, to Chipping-Farringdon in Berksbire. It was objected, That Chalbury ought to have appealed, and got the order upon them discharged, which Holt, C. J. agreed; for sending the Holt 509. S. C. poor man to another place, is fallifying the first order, which cannot be done but by appeal; for the order of two justices is a determination of the right against all persons, till it be reversed: Chalbury should have appealed from the Warwicksbire order, and got that set aside, and sent the man back thither, and the justices there should have sent him to Chipping-Farringdon; therefore naught.

#### 50. Inter The Inhabitants of Ware and Stanstead-Mount-Fitchet.

[Trin. 12 Will. 3. B. R.]

A N order was made by two justices, to remove H. with his wife and children, from Ware in the county of Essent to Stanstead in the same county. Exception was taken to this by Mr. Eyre, 1st, Because it was, with wife and children. 2dly, Because it was said, It appears upon examination before us, or one of us, &c.; and the examination ought to be before both, because both are to make the judgment of removal. Mr. Cowper would have diftinguished this as the first exception from the case of Mich. 10 Will. 3. ante, pl. 35, 41. Of his wife and family, because he might have servants not removeable, but children ought to follow their parents. To the second he faid, That by 14 Car. 2. c. 12. the complaint is directed to be made to any justice, and in consequence one justice may examine:

Examination must be by both justices. See 6 Mod. 180.

examine; and it was only necessary that two should join Faress. 54. Antein removing: Sed Cur. contra in both. To the first Holt, Pl. 22. C. J. said, Suppose H. had put his son out to service at fixteen years old at B., and accordingly he had served there a year, and after the father comes to live at B. himself. and the fon to live with him; fuch an order would remove the fon, though he be not removeable. To the second, Gould, J. said, The statute directed, and the practice was, to make complaint to one justice, and he grants his warrant to bring the poor man before two justices, and then they two examine and remove (a).

- (a) Vide 2 Str. 1092. Bur. S. C. 136. 2 Bott, 3d edit. 769. 3 T. R. 707.
- Dominus Rex versus The Inhabitants of Long-Critchell.

[Mich. 12 Will. 3. B. R.]

A Man was removed from the parish of Allhallows to Order of execution, Cases B.R., the parish of Long-Critchell. He goes from Long-419. S. C. Critchell to P.; they got several orders from two justices, Holt sia by way of execution of the first order, to remove him P. to L. But all of them were quashed, because P. ought to have made an original complaint, and upon that have got an order, and not have grafted on the order of removal from A. to L., though they might have used that as evidence to induce the justices to make such original order.; for P. is a third parish, against which L. is not (b) bound by the order of removal from A. to L., but may contest the right of settlement with them. Mr. Upton took See 5 Mod. 321. an exception, that the enforcing orders did not appear to 430, 488. And made by two justices, quorum unus: And Holt, C. J. 436. pl. 18. & feemed to think that a good exception, because such per- Fort. pl. 60. sons as cannot make an order, cannot execute it: But the orders were quashed upon the first reason.

(b) The contrary is clearly law, as is held in the next succeeding case. It was acknowleged, 3 Bur. 551., as a settled point, that an order of removal to a parish confirmed, or without appeal, concludes that parish against all the world. The fame is held, 2 T. R. 598.; but the decision in this case may be, and (come femble) is good; though the reason to which this annotation is applied is falle.

#### Inter The Inhabitants of Thackham and 52. Findon in Suffex.

[Hill. 12 Will. 3. B. R.]

Two justices order not appealed from binds the whole parish upon which it is made, till a new fettlement is gained. Vide ante, pl.

33 & 49.

Vide note to preceding cafe.

Poor person was removed in 1694 from West-Starring to Finden; Finden does not appeal. In 1700 the man comes to Thackham, and Thackham fends him by order of two justices to Findon; Findon appeals, and the order was discharged. All three being now brought up by certiorari, it was moved to quash the order made upon appeal, and urged that Finden was bound by the first order from West-Starring to them, from which they never appealed, with respect to all the world, and are concluded to fay, that the place of his last legal settlement was not with them: But in respect of the distance of time, the Court could not tell but he might have gained a new fettlement at Thackham, and that might appear to the justices, and they might have good ground to discharge the order of the two justices. Then the counsel offered to produce an affidavit, that there was no new fettlement proved; that the Court held that they could not examine that by affidavit, nor inquire thereby into the reason of making the order (.1). Ex motione Mr. Shelly.

(a) Vide 2 Bat, 3d edit. 860. 2 Bur. S. C. 394.

490 Vide Post 491. s Saik. 07, 68.

53. Ditton's Case.

[Pasch. 13 Will. 3. B. R.]

Order for difcharging an apprentice, the master not ap-'lemp. Hard. 101.

MOVED to quash an order made for the discharge of an apprentice: The question arose upon the clause of the statute, which directs, That upon the appearance of rearing. Vide the master the apprentice may be discharged by four justices, after the next justice hath endeavoured to compose 6 Mod. 139, 140. the matter in difference. In this case it was objected, Rep. B. R. that Ditton the master was bound over to appear and did that Ditton the master was bound over to appear, and did not; and the justices have but a limited jurisdiction; and it is expressly directed by the act, that this discharge is to be made on the appearance of the master; besides, there is another remedy to proceed on the recognizance, which is forfeited by not appearing.

Per Cur. The act must have a reasonable construction, fo as not to permit the master to take the advantage of his own obstinacy; and it would be very hard, that supposing the mafter is profligate and runs away, the apprentice shall never be discharged. Afterwards exception was taken,

because

because it appeared upon the sace of the order, that Ditton was a collar-maker, & non conftat what the trade is, nor that it is within the statute; like Comfort's case, Ante 67, 471. where one was bound to a mantua-maker, when there is was no fuch trade within the statute, nor at the time of the statute (a): And in this case it was faid, that the jus- 1 Saund. 313, tices might make the master make restitution of part of Skin. 108. the money, and that it hath been so adjudged.

(a) This is now clearly immaterial, Str. 663. 1 Bott, 3d ed. 515.

#### 54. Inter The Inhabitants of Watford and Wendover.

[ Pasch. 13 Will. 3. B. R.]

TWO justices of St. Albans made an order, that whereas Appeal from they were credibly informed, that Wendover was the order of corpoplace of H.'s last legal settlement, but no where adjudged must be to the it to be so; from this order there was an appeal to the sessions of the quarter-fessions of St. Albans, where it was confirmed; county, not of and both were quashed; the first because they were producted. and both were quashed; the first, because there was no adjudication of what was the place of his last legal settlement; and the fecond, because the appeal ought to have been to the fessions of the county, not of the corporation; and as it was, it was coram non judice.

#### 55. Inter The Inhabitants of Suddlecomb and 491 Burwash.

[Trin. 13 Will. 3. B. R.]

\*XCEPTION was taken to an order of two justices, Complaint that because it was only said to be complained by the H. is likely to be chargeable, churchwardens, that the person removed was likely to be-not enough come chargeable, but not adjudged so by the justices. without adjudia Holt, C. J. said, That the justices cannot remove a man, cation; but, Whereas it apunless he be likely to become chargeable, for otherwise pears to us, on they might remove a man of an estate; and he took a complaint, &c. diversity, that where the order is, Whereas it appears to us, that H. is likely, &c. is sufficient. &c. on the complaint, &c. that J. S. is likely to become charge- Acro 4-3, 47%, able to the parish, that will be well enough; but where it is, 47%, Post 533. as here, Whereas complaints has been made, &c. that is ill: 1 Sid. 99. But it was agreed to be referred to the judge of affize. Raym. 65. Postea, Pasch. 2 Ann. B. R. The case of the Inhabitants 1 Show. 76. of Darnell in Cheshire, the same resolution. Posseo, Pasch. 3 Mod. 270. 2 Ann. B. R. the same resolution. It ought to appear, S. C. 6 Mod. that the person removed, is a person removcable, and 163, 164. Holt

2 Str. 77, 587.

576. Doug. 662. there ought to be a particular averment, that he is likely to (637.) Sett. and become chargeable.

#### **5б.** Dominus Rex versus Johnson.

[Trin. 13 W. 3. B. R.]

Beffions may make original arder to difcharge apprentice. See | Salk. 67, 68. S. C. 2 Mod. 2, 287. 3 Saund 314, 316. 1 Vent. 174, 175. Rep. B. R. Temp. 243, 704.

THE justices of peace at Newenfile in Northumberland discharged an apprentice by an original order made at the fessions, without any previous application to a justice of the peace to endeavour to compromife the matter, as the statute directs; and after several debates it was adjudged, that if this had been a new thing, the Court would have thought a previous application to a justice neceffary; but there having been so many original orders Hard ror. Str. made at fessions brought into this court, and confirmed here, it was too late to call this matter in question; so the order was confirmed.

## 57. Minchcamp's Cafe.

[Trin. 13 Will. 3. B. R.]

luftices at feffions are proper judges, whether fit to oblige H. to take an ap. prentice, or not. Vide 6 Mod. 163, 164. 2 Saik. 66, 68, 381. 6 Mod. 164. 1 Show. 1 Lev. 84. 5 Mud. 139, 314, 316. \*[492]

HE being a merchant at Mile-End, two justices bound a poor girl apprentice to him; he appealed to the selfions, and the order was discharged; because they thought it unfit to compel a merchant to take an apprentice; and now this Court, on consideration of the matter, confirmed the order of fessions; because the late act having made persons compellable to take apprentices, and given an appeal to the fessions, it was in the discretion of 76. 3 Mod 270. the justices at sessions to determine, whether it was or was not fitting to put an apprentice upon any one; and therefore the Court would not disturb what the sessions 240. 1 Saund had done, but confirmed the order.

#### 58. Inter The Parishes of Swanscomb and Shensfield.

[Pasch. 1 Ann. B. R.]

Order reverled is tween the par-

A Poor man was fent by two justices to Shensfield, and upon an appeal the order was confirmed; afterties: Order con- wards Shensfield fends him by an order to Swanfcomb: All armed, or not appealed from, is these orders being brought up by certiorari, the order to final as to all the fend him to Swanscomb was quashed, because, by the deworld. Ante, termination of the justices in affirmance of the order on

the appeal, Shensfield was estopped against all the world pl. 45. I Vent. to fay, That was not the place of his last legal settlement; 310. 5 Mod. for the inflines cannot remove hit to the place of his last legal settlement; 417. 6 Mod. for the justices cannot remove, but to the place of the 269, 287. last legal settlement; and shewing any later place of settlement will discharge the order on the appeal; and the Post. 524, 527. diversity is between an order discharged and an order confirmed upon appeal, or not appealed from. In the first 17, 551, 425. cale, the matter is at large as to all places, but the place Cald, 59. to which the poor man was fent, which, upon the appeal, was determined not to be the place of his last legal settlement. But in the later cases, the place to which he was fent is bound, and the order final and conclusive as to all the world.

#### 59. Inter The Inhabitants of Weston-Rivers 5, C. 5 Mod. and St. Peter's in Marlborough.

ver. Inhab. of

I) PON an order of two justices, it was objected, 1st, It is necessary to That it was not faid that the woman was poor, &c., fiew in a re-but lame, and like to become poor. 2dly, That it was it was made upon not said she did not offer security. 3dly, That it was said complaint of the to be upon complaint only, and not of the churchwardens, church-wardens, ens, &c., but
4thly, It was not faid she rented not a tenement of not that the party 10 2 per annum. The two last were the objections chiefly did not rent a infi Red upon; and the Court was clear as to the first of per annum. the Le two, viz. that it must be upon complaint of the vide ante 421. churchwardens, &c., and so appear; but, upon reading the post. 524, 536.

Teturn, another question arose; for the return set forth at Case. 83. S. C. lar Re, that upon complaint of the churchwardens and over- Carth. 365. feers of the poor concerning A. to the justices, they the Hoit 510. faich justices, one of the quorum, made the following order 3 Salk. 254. in Bec verba: For a much as complaint hath been made to us, 18, 165. Cates &c. fo that it was urged, that the defect of the order was B.R. 89. Desupplied by the return of the certiorari. As to the last of feet of an order the four exceptions, Holt, C. J. faid, that before 13 Car. 2. by matter alleged two justices \* removed by consequence of law, upon 43 in the return. Eliz., because that statute makes a provision, that every \* [ 493 ] Parith shall maintain its own poor; therefore the justices confidered who were properly the poor of a parish, and they were held to be such as were there settled a convenient time, which was thought a month, so that a month's abode made an inhabitant. Still there remained several doubes, which occasioned 13 & 14 Car. 2. c. 12., upon which statute the present question arises, viz. Whether the power to remove be not founded on 13 & 14 Car. 2., but On the law, as it was before? And fince fuch an order would serve to remove before, why will it not serve now, since the statute? Or whether 13 & 14 Car. 2. obliges the justices

justices to alter the form of their order? And this depends upon this part of the statute, viz. Whether it be by way of giving jurisdiction or restriction. At another day, Holt, C. J. pronounced judgment; as to the exception to the not averring that she did not rent a tenement of 101. per annum, he said, the secondary had searched the precedents, and they are without this clause, according to the form of the orders before 14 Car. 2. And this order therefore is well enough; and if the party rents a tenement of 10 l. per annum, he may appeal to the sessions. As to the other exception, it is fatal (a), for no one can disturb a man coming into a parish, but they that have authority to do it. A complaint ex officio from one not concerned is nothing, it may be the parish are willing to keep him; and as to the return, that cannot cure the order, for they had exercised their authority before; and by the certiorari they have no power but to return the order in hac verba; and therefore what they think fit to return farther the Court can take no notice of.

On certiorari justices can only seturn the order in hæc verba. Vide 1 Saik. 147.

(a) Vide Foley 267. Set. & Rem. 35. Bur. S. C. 24. And. 361.

#### 60. Inter The Inhabitants of St. George's and St. Olave's, Southwark.

Justice cannot command the officers of the parith whither H. is lent to remove him. Vide ante 436. pl. 18, & 489, pl. 51. Comp. 325. Carth. 449.

WO orders were returned, the first for settling a poor man, one Thomas Gill, and the second a confirmation of the first, upon an appeal to the quarter-sessions: The first order recited, That whereas complaint bath been made to us, &c., that T. G. had of late intruded into the parish of St. George's, we adjudge him to be last legally settled at St. Olave's: These are therefore to require you to convey the faid Tho. Gill to the parish of St. Olave's; and the direction upon the order was, To the churchwardens and overfeers of the poor of the parish of St. Olave's: Quashed; for they ought, and can only order the parish-officers where the intrusion is made, to make the removal.

#### 61. Inter The Parishes of St. Andrew's Hol-[404] born, and St Clement's Danes.

[Mich. 3 Ann. B. R.]

Seffions being but one day in law, may alter their judgment

THE Court of quarter-sessions of Middlesex made an order, and afterwards the fame fessions vacated it by a subsequent order; and a certiorari being brought, both and make a new orders were returned thereon. Et per Holt, C. J. You

should not have returned the vacated order, but only the order; but must latter. This is as if we, difliking our judgment, should certify the latter vide the same term make an entry of two different judgments, 6 Mod. 287, and teturn both upon a writ of error, which ought not to Post. 605, 606. be: The fessions is all one day, and the justices may alter 5. C. Post. 606. their judgment at any time, while it continues: Thus, at Sett. and Rem. the Old Baily, you see judgment de pain fort & dure given; 168. Holt 511. and yet, if the party will plead, we will set aside that judgment, and admit him to plead.

# Dutlawry.

## Rex & Regina versus Tippin.

3 Show. 80,309. 2 Show. 60, 65.

[---1 W. & M. B. R.]

ONE was outlawed upon an information for feducing H. outlawed for 2 young gentleman to marry 2 young woman of 2 missemeanor, cannot be therelews character, and fined 5000 l. And it was moved in on fined for the behalf of the defendant, that he could not be fined upon fact. See 1 Lev. the outlawry, because in misdemeanor the outlawry does 33, 34. a Lev. not enure as a conviction for the offence, as it does in cases a Chan. Cas. 44. of treason and felony; but as a conviction of the con-Carth. 384. tempt for not answering, which contempt is punished by 5 Mod. 221. the forfeiture of his goods and chattels; and if he might 7 Mod. 39. be fined now, he must be fined again upon the principal 8 Mod 177,178. Judgment. And the first was held to be irregular, for the outlawry in these cases is not a conviction, as appears by Fleta 42. Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus est de facto principali.

### 2. Attorney General versus Baden.

[495]

[Mich. 5 W. & M.]

A Owes money to B. on a judgment, and to C. on a vide Ray. 17. bond; A. is outlawed at the fuit of the obligee, and I Lev. 33, 34. his lands feized on the outlawry; and the question was, 2 Lev. 49. Ca.
Wheth a continuous of the indoment could extend these Whether the conuse of the judgment could extend these 106. lands? And it was held the outlawry should be preferred, that the king's hands should not be amoved, unless the consider could show covin and practice between the obligor and obligee. Vol. IL

H

## Adlame versus Colebatch.

[Pasch. 8 Will. 3. C. B.]

Where the plaintiff shall reverse it at his own 46.

T was moved in C. B. that the plaintiff might reverse an outlawry at his own charge, upon affidavit, that c arge. 2 Vent. the defendant was actually in the Fleet in execution for the plaintiff in another fuit, and he knew it; and it was granted, because the plaintiff should have brought him to the bar by babeas corpus, and there have charged him with a new declaration (a).

(a) Vide Rep. B. R. Temp. Hard. 123.

#### Lee versus Millard.

[Mich. 8 Will. 3. C. B.]

Note; The law is now altered in this particular, by ftat. 4 & 5 W. & M. c. 18. Vide post. pl. 6. See 2 Lev. 464. Cro. El. 170, 3-3. Vi. Barnes 324.

A Like motion was made upon affidavit, that the defendant lived publicly, and was denied. Et per Powell, J. Such motions are frequently granted in B. R., because it is a great charge to reverse an outlawry there; for the defendant must appear in person, but here he needs not, and the charge is but 16s. 8d., not so much as a bailist's fees for an arrest. We have always denied this motion of late. 2 Ven. 46.

## 5. Arthur's Cafe.

[Hill. 8 Will. 3. B. R.]

Error to reverfe outlawry for fc. lony; if there be lands there must go a scire and immediate, facias is necesfary. S. C. Holt 518. Vi. 1 And. 188.

ARTHUR was outlawed for felony upon five indict-A ments, and afterwards came in, and was brought to the bar, and asked what he had to say why judgment should not be given? He produced five writs of error. Et racias [against per Holt, C. J. If there be no lands, the attorney-general and lords, mediate may confess error, and then he shall plead presently, and be tried upon the indictments. If there be lands, there 2 Hawk. c. 50. must be a feire facias against the lords, mediate and immesect. 13.] but if diate, to shew cause why he should not have restitution. attorney-general confess on re- But if it be suggested on the roll that he has no lands, and cord that there are none, no scire the attorney-general consesses it, there needs no scire fa-

A feire facias must be into all 3 Keb. 29. But not in outlawry for counties where the criminal has lands, treason, 2 Hawk. c. 50. sect. 13.

## Anonymous.

[Mich. 10 Will. 3. B. R.]

H Was outlawed in two actions, one was 10%. the Defendant need other for 40s.; and, upon reversing the outlawry, not appear in the Court took special bail for the first, and an appearance person to reverse for the other, upon 4 5 5 W. & M. c. 18. Note; The in treason or serecognizance was taken pursuant to 31 Eliz. c. 3. Note; lony. Vide ante, Now per 4 & 5 W. & M. one outlawed, except for trea-pl. 4. Sty. 297. fon or felony, need not appear in person to reverse an out-1 Wilson 3. lawry, but by attorney.

2 Stra. 1178. lawry, but by attorney.

## 7. Symmons versus Bingoe and Cook.

[Pasch. 4 Ann. B. R.]

THE defendant Bingoe being a feme, and waived upon If two are outprocess of outlawry, it was now moved on her behalf, lawed, error to that upon filing common bail, she might have liberty to brought in the reverse the outlawry. Per Cur. The writ of error to re-name of both, verice the outlawry must be brought in the name of both but one may be the Parties that are outlawed; and if one only appears, the fevered. Cro. EL other may be summoned and severed, and then the out- 270, 278. lawy may be reversed for the benefit of him who appears only. Before it can be reversed for want of proclamations, 31 Eliz. c. 3. the Darty outlawed must give bail to appear, and to answer in a mother action.

If the party outlawed comes in gratis upon the return of If H. comes in the exigent, alias or pluries, he may be admitted by mo-gratis, he may tion, to reverse the outlawry, for any other cause, but bail; otherwise, want of proclamations, without putting in bail. If he if by cepi corpus. comes in by cepi corpus, then he shall not be admitted to Cro. El. 707. reverse the outlawry, without appearing in person, as in fuch case he was obliged to do at common law; or putting in bail with the sheriss for his appearance upon the return of the cepi corpus, and for doing what the Court shall order. Appearing by attorney is an indulgence by 4 & 5 W. & M., and the bail is to be special or common in this as in other cases (a).

Of pleading outlawries in bar or abatement, vide Cro. Car. 566. 3 Lev. 29. 1 Show. 8. And how to plead an outlawry fire or after judgment, see 1 Lutw. 110, 111. And how to please it in the same court, and how in another, 1 Lutw. 40.

2 Lev. 50.

(e) R.acc. Sercole v. Hanson, 1 Wils. 3 Bur. 1482. Campbell v. Daley, 3 Bur. 3. 2 Str. 1178. Gracrast v. Gledowe, 1920. Vide Barnes 326.

Vide post. 658, 701. Lutw. 1643. 2 Lev. 142. I Saund. Hob. 217. Fmefl. 9 & 38. 6 Med. 28.

# Over and thewing of Deeds. Wirits. &c.

### 1. Salisbury versus Williams.

[Mich. 4 W. & M. B. R.]

only form. Vide flat. 4. 5 Anne, · C. 16.

Want of profert, N debt on a bond in the grand fessions of Wales, the plaintiff omitted in his declaration to make a profert, &c. Judgment was for the plaintiff; and now in error this omission was insisted on, and the Court held it only matter of form, of which no advantage could be taken after verdict, or on a general demurrer, and therefore affirmed the judgment. Sid. 249. Cro. Car. 190. Cro. El. 153. 217. 16 & 17 Car. 2. cap. 8.

#### Morris's Case.

[Tri. 7 Will. 3. B. R.]

Upon profert made unnecella rity, oyer shall not be given. Vide 6 Mod. 28. 3 Lev. 50.

I N replevin, the defendant avowed for a rent-charge, and made title by a will, and pleaded it with a profert, and the plaintiff infifted to have oper, alleging it was the avowant's folly to make a profert of it, and he ought to take advantage of it. Et per Gur. He was not bound to plead it so; it is but surplusage, and we will not compel him to give oper of it.

#### Roberts versus Arthur.

[Mich. 13 Will. 3. B. R.]

term it is produced ; otherwife, of letters teftamentary or of administration. S. C.

Deed remains in UPON the profest of a deed it remains in court all Court all the that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court; for the party may have occasion to produce them elsewhere. Vide 36 H. 6. 30. Per Cur.

Where the letters patent pleaded, are recorded in the Cases B. R. 598. same court where the plea is pleaded, the party need not Holtas. Where patents must be show them; but where in another court, he must plead thewn, and where them with a profert in Cur., or the exemplification of them not. Mod. Cafes under the great seal. Per Holt, C. J.

231. 5 Co. 76. 2 Lev. 142. Fasell. 9, 38. Lutw. 1644.

4. Longavil versus The Hundred of Isleworth. S. C. 6 Mod. 2-7, Holt 518.

[Mich, 2 Ann. B. R. 2 Ld. Raym. 969. S. C.]

N debt against the hundred of Isleworth; the defendant Devial of over pleaded in abatement caption del robbers, &c., the whereit ought to plaintiff replied nul caption, &c., upon which it was de- error, otherwise murred, and a respondens ousser awarded; and now all be- of granting it, ing the same term, the defendant craved over of the writ, where it ought not. 6 Mod. 28, and that being fet forth, pleaded the general issue. Et per 292. Holt, C. J. To deny over where it ought to be granted is error, but not e contra; Therefore we ought either to grant or to enter the denial upon record, that they may assign it for error. If the plaintiff will contest it, he may strike out the rest of the pleading, and demur, in order to obstruct the over: And at another day it was ruled, that the Vide Doug 227. defendant could not have over, because he had already (215). 1 T. R. pleaded in abatement, and having of over is never to enable 150. pleaded in abatement, and having of over is never to enable the party to plead in bar, but to plead to the writ, which is done already, and therefore past.

# 5. Armit versus Bream.

[Mich. 3 Ann. B. R.]

S. C. 6 Mod. 244. Holt 212. 1 Salk. 76, ante

WHERE a man has obliged himself to make a deed, Wiere H. is and is sued for not doing it, it is not enough to say, bound to make a deed he sauft set that he made the deed, viz. lease, bond, &c., but he must it forth; otherlet it forth, that the Court may judge of its sufficiency; wise where to for it ought to be a good deed; but if it be to deliver, or and produce it shew, or produce a deed, that is, a deed already made, only. there it is enough to fay, that he delivered, or shewed, or Vide Yelv. 111. produced it. Per Holt, C. J.

### Cook versus Remmington.

S. C. 6 Mod. 237.

[Mich. 3 Ann. B. R.]

N debt upon a bond, the desendant demanded over of Desendant dethe condition, which was, to perform covenants in an indenture, which indenture, and then demanded oyer of the indenture; and he ought to set the plaintiff gave it him, omitting an indorfement, which forth himself, was made before the execution of the deed; upon this over and the plaintiff gives over, but the defendant pleaded performance; the plaintiff replied imperfed, it is and fet forth the indorsement, and prayed judgment for at the defendthe variance. Sed per Cur., 1st, The defendant should ant's peril. See have see from the indicate the second secon have set forth the indenture himself, being a party to it, i Saund 3.

and

 $H_3$ 

1 Sid. 50, 97, 495. 1 Mod. 266. 1 Vent. 37. 1 Saund. 9, 122. Cro. Jac. 360. Keilway 71. \*[499]

and should have pleaded performance to all the covenants therein. 2dly, The plaintiff was not obliged to give oper of the indenture, and though he did, yet doing what he need not do, the setting it forth is not at his peril, as where he is \* obliged to fet it forth; nor is he concluded to fay, that there is more contained in the indenture, but at liberty, as well as if the defendant himself had set it forth; and the Court held, that as the defendant was bound to fet it forth. fo he was bound to supply this omission, and make his plea complete; and, for this, judgment was given for the plaintiff.

• A deed may be pleaded as lost Read v. Brookman, 3 Term Reports by time or accident, without profert, 151.

Vide Lutw. 1009. Cro. El. 464. 5 Co. 49, 5c. Hutt. 21. 1 Show. 284. 2 Show. 334. 2 Hawk. P. C. Gap. 37-

# Pardon General and Special.

#### Dominus Rex versus Parsons.

[Hill. 3 W. & M. B. R.]

lowed without writ of allowance, certifying furcties taken for the peace. I Lev. 25, 26, 120. 3 Lev. 136, 332. I Show. 283. • 5 & 6 W. & M. c. 13.

Pardon for murder not to be al.

PARSONS was indicted, convicted, and attainted for the murder of Mr. Wade, and pleaded their majesties' pardon; and note, it was for murder by express words, without any non obstante, the non obstante being taken away by the statute of W. & M. And Holt, C. J. asked See 1 Saund. 362. for the writ of allowance, which should certify he had found furety of the peace within eight (a) months after the pardon; whereupon the writ of allowance was read: And Raym. 13, 370, Holt, C. J. faid, that the Court ought not to allow the 477. Farefl. 153. pardon till thus certified, and that this was a condition S. C. Holt 519. precedent, by the statute of Edw. 3.; and Winnington moved, that the pardon ought not to be allowed; arguing, that the crime could not be pardoned: But Holt, C. J. faid, there was as good reason why the king should pardon an indictment of murder, which is his fuit, as why a fubject should discharge an appeal, which is the suit of the subject; and that the king was, by his coronation-oath, to shew mercy as well as to do justice. He said, the statute of 2 Ed. 3. c. 3. meant only, that the king should be fully informed before he pardoned any felony; and that the reason of that, and other restrictive statutes, was for that,

King may pardon murder by express words.

(a) Query, if this ought not to be three months. Vide Preamble to 5 W. & M. c. 13.

after

after the statute of Gloucester, c. 9., upon a murder done, March 213, it was usual to apply to the Lord Chancellor, and gain a 217. Raym. 13, parton by undue means and false suggestions. with some pardon by undue means and false suggestions, with gene- 28. ral words in it; and this was the occasion of those restrictive fautes, that application should be made to the king is person, to the intent the king himself might be apprized of the matter. By 13 R. 2. c. 2., great difficulties are put upon those that shall be suitors for a pardon of murder, they are to incur a penalty, &c., but this was found greeous to the subject, and therefore was repealed by 16 R. 2. c. 26., which shews the necessity there is that the king should have a power to pardon; upon which the pardon was allowed.

[ 600 ]



## Foxworthy's Cafe.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 848. S. C.]

FOXWORTHY pleaded his pardon, and there was Onepardoned a mistake in the proceedings. At another day he shall not be charged in cufcame, and having got the fault amended, it was allowed. tody with civil His creditors now moved that they might have leave to actions, quare? charge him with actions, as in custodia, but were not per
Science Sc queen's pardon, by rendering him incapable of performing 521. the condition, which is, to go beyond the seas, &c.; and this is not unreasonable; for without the pardon the attainder had continued, and he must have been hanged; Vide I Wils. and there is no reason why the pardon should put the crediton in a better condition than otherwise they would have been, to the prejudice of the party; for the pardon was given for his benefit, and not for the benefit of his creditors.

# Palatine Counties of Chester, 2 Lev. 452. Durham. &c.

Wilbraham versus Poley.

[Trin. 12 W. 3. B. R. 1 Ld. Raym. 591. S. C.]

MR. Acherley moved the Court to stay the return of a Error to the writ of error out of Chancery, to reverse an out-county palatine lawry in the county palatine of Chester, according to the H 4

opinion of my Lord Coke, 4 Inft. 214., quod vide: Sed non allocatur; for this old usage is gone by 32 H. 8. c. 43., and 33, \$ 34 H. 8. c. 13. There were no outlawries in Chefter before 33 H. 8. c. 13., for coroners are there introduced by that statute; and there was no Chief Justice in Chester till Q. Elizabeth's time, for till then there being but one, there could be no Chief. Vide the account of this custom at large in Dyer 345, 320, 321.

Vide 1 Mod. 251. 2 Mod. 237. Ante 486. 11 Co. 25. b. Co. Lit. 125. b.

## Parish Town, Uill, &c.

#### Rudd versus Morton.

[Mich. 4 W. & M. B. R.]

Evidence of a reputed parish within 43 Eliz. Vide Cro. Car. 92, 384, 396. 4 Mod. 157, 158. called Rudd, verf. Fofter, Poft. 572. Raym. 67.

PON a trial at bar in replevin, wherein the defendant avowed as overfeer of the poor, the question was. Whether Stratton was a reputed parish of itself, or part of the parish of Biggleswade in Bedfordsbire? Et per Cur. To make Stratton a reputed parish, within 43 Eliz., it must have a parochial chapel, and chapelwardens and facraments, at the time the statute was made; and because the pretended parish of Stratton had but one chapelwarden, whose office it was to collect the rates taxed upon Stratton, and pay them to Bigglefwade, they were held part of the parish of Biggleswade, and not a reputed parish within 43 Eliz.; and their having a distinct overseer, and maintaining their own poor, was not thought sufficient to make them a distinct parish.

Vill, quid. Vide z Inft. 125. b. 1 Lev. 78. See Hob. 296. 4 T. R. 552.

A parish shall be intended a vill prima facie; adjudged Mich. 6 W. 3., Wilson versus Laws.

If a place be named generally, that place shall be taken to be and intended a vill; adjudged Mich. 10 W. 3. B. R. Vinkeston versus Ebden.

### 502

### Dominus Rex versus Bernard.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 94. S. C.]

chosen in the leet

Regularly a conflable is to be
a corporation, according to custom debito modo, refused choien in the feet to take upon him the office; and, upon demurrer, it was faid

faid per Holt, C. J. that at common law all constables were in a corporation faid per Holt, C. 1. that at common law all confidences were by custom. See chosen at the leet: Where there is no leet, at the turn: by custom. See chosen at the leet: Where there is no leet, at the turn: Whether by the steward or the homage, has been a great 1 Mod. 13. queltion: But without question, a corporation, of common Alleyn 78. right, cannot choose a constable: By custom they may, as pl. 2, 2, 541.
having the government of the place reposed in them; but pl. 5. 1 Buls. then they must prescribe for it.

127. Skin. 669. S. C. Comb. 416. Holt 152. Set. and Rem. 214. Cafes B. R. 125.

# Parliament.

See 1 Chan. Caf. 201, 241. & post. 509.

#### Prideaux versus Morris.

Far. 13. S. C.

[Trin. 2 Ann. B. R.]

IN an action on the case for a salse return of parliament- No action lies men, against the sheriff, the plaintiff declared, that at common law against an officer whereas he was duly elected, the sheriff returned A. B. to for a table return be duly elected, who was, in fact, not duly elected. Mr. of members to River objected, that the right of election was only to be parliament, under the left where the determined in the House of Commons; for that it was a right is deter-Parliamentary matter, which ought not to be tried here, mined, or cannot no more than the right of precedence. Mr. Eyre contra, be determined in That this Court may determine what is an act of parlia- 6 Mod. 45, 49. ment, 8 Co. 1., their privileges, Mo. 67. 1 Ro. 903. 1 Salk. 19, 20. Dyer 275., the right of peerage: And here the right of Mod. 311. election is no otherwise in question, than as it is incident 3 Lev. 20, 30. to the falsity. Holt, C. J. The cause of the plaintiff's suit Lutw. 268. 2 Sid. is a wrong done out of parliament, and whatever falls un86, 114, 250. der the regulation of law, and is done out of the houses 2 Vent. 50. of Parliament, is subject to the law of the land, for laws 1 Vent. 206.

The to be executed out of parliament; but as for the rules 6 Mod. 100.

Luty 82. of the House, as sitting, meeting, &c.. they are within N. L. 31. Holt the House, and the judges cannot know them, there being 523. 8 S. T. 9.

no Practice of them out of parliament: But if the parlia- Mod. Cases 48.

King's Courts ment should make a law concerning them, or they should may judge of become necessary to be determined on the account of some parliamentary other matter cognizable by the judges, the judges must See 6 Mod. 45, take notice and determine them, as in Bynion's cafe.

And Holt, C. J. seemed to be of opinion, 1st, That for Pollers. 470. a do table return no action lay against the sheriff before the 2 Keb. 356, statute of 7 5 8 W. 3. c. 7., not only because it is the Lutw. 88, 80. method the theriff has to indemnify himself; but Hob. 43. 1 Cro.

fon 127, where C. J. Willes ways fet his face of Pridents v. Mostis.

142, 535. I Jo. when the right comes to be determined in parliament, one indenture returned is taken off the file, and then there is no double return. 2dly, He seemed to think, that for a fays, he shall al- false return the party could have no action, where there ways set alls take might be a determination in the House of Commons, because of the inconvenience of contrary resolutions; and fo if a fuit be between A. and B., A. is voted elected, B. cannot bring an action, and say, that he was duly elected and returned, because his name does not appear upon record; and he is estopped to fay, that A. was not duly elected and returned; but where the right of election either is determined, or cannot be determined in parliament, as in case of a dissolution, an action lies for the false return, for the courts at law can neither anticipate nor contradict their judgment. Upon a writ of error of judgment in C. B., for the defendant (a).

(a) In the case of Wynne v. Middleton, 1 Wilf. 125, Willes, C. J. in delivering the opinion of the judges in the Exchequer-chamber, said, he was clear that an action would lie at common law for a falle or double return of a member of parliament, and that it was not necessary that there should be a determination in the House of Commons as to the election before an action

for a false return could be brought. He said he should always set his face against the case of Prideaux and Merris. The point decided in Wynne and Middleton was, that in an action upon the flatute it is not necessary to appear that there was any resolution of the House of Commons respecting the right of election.

5 Mod. 311, 312.

### Domina Regina versus Paty & al.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1105. S. C.]

On commitments by the House of Commons for privilege, no court can deliver on a habeas corpus: Held by three flaisge eggbut Holt, C. J. See 1 Salk. 19, 20. 6 Mod. 45. 1 Mod. 145. 2 Lev. 114, 250. & ante 502. 2 Show. 84. Pollexf. 470. Fareft. 13. 6Mod. 47. Holt 526. S. C. 3 Keb. 365, 3S9, 664.

THE defendants having been committed to Newgate by the House of Commons, were now brought into court by feveral writs of babeas corpus; and the cause of their: commitment was returned to be a warrant figned Robert Harley, Speaker, requiring the keeper of Newgate to take into his custody the several persons, defendants, for having commenced and profecuted an action at law against the constables of Aylesbury, for refusing their votes in the election of members of parliament, in contempt of the jurifdiction and open hreach of the known privileges of the House of Commons. Mr. Lechmere, Page, Montague, and Denton, who were of counsel for the prisoners, prayed that they might be discharged for several reasons: 1st, Because the warrant was not under feal, as it ought to be. Because the commitment was to remain during pleasure. adly, Because they had done no unlawful act; for the profecution of a fuit is lawful, and no breach of the privilege of that House. But Powell, Powys, and Gould, Jus-

tices, held, 1st, That the commitment was well enough in form; because it was according to the usual manner of commitments by that House. 2dly, That the House of Commons were the proper judges of their own privileges; and this Court was now estopped to say, that this was not a breach of the privileges of the House of Commons, or that the House of Commons had no such privilege. Helt, C. J. contra said, that this was no breach of privi- Filing and conlege of the House of Commons; that the commencing and tinning critical, no breach of getprofecution of an action did not necessarily imply a going vilege. father than the bare filing and continuing of an original, which is no breach of privilege: He faid, the fuing was no breach of privilege, nor can their judgment make it fo, nor conclude this Court from determining contrary; when the House of Commons exceed their legal bounds and authority, their acts are wrongful, and cannot be justified more than the acts of private men: That there was no Authority of question but their authority is from the law, and as it is Common circumscribed by circumscribed, so it may be exceeded: To say they are law. Post. 322. judges of their own privileges and their own authority. and no body else, is to make their privileges to be as they would have them. If there be a wrongful imprisonment by the House of Commons, what Court shall deliver the party? Shall we say there is no redress, and that we are not able to execute those laws upon which the liberty of the queen's people subsites? To conclude, All Courts are 10 far judges of their own privileges, and intrusted with a Power to vindicate themselves, that they may punish for contempts; but to make them, or any Court, final judges of them, exclusive of every body else, is to introduce a state of confusion, by making every man judge in his own cause, and subverting the measures of all jurisdictions (a).

And now a new question was started and referred to the Writ of error is Judges, Whether the queen ought to allow a writ of er- of right in all for in this or any other case ex debito justitia, or ex mera treason and fegratia? And ten of the judges were of opinion, that the lony. See queen could not deny the writ of error; but it was grant- 2 Show. 85, 98. able ex debito justitia, except only in treason or felony. Vide <sup>2</sup> Lev., Thurston's case. Price and Smith held, that the

6 Mod. 130.

(4) This question was again brought before the Court of King's Bench in the Hon. Alex. Murray's case, 1 Wils. 299; and before the Common Pleas in the case of Brass Crosby, 3 Wilj. 188. Bl. 754.; in both of which it was ruled, according to the above decition, that a person committed by the House of Commons for a contempt cannot be discharged by a Court of

common law. The learning upon the fubject appears most fully in Crosby's case, as reported by Wilson; from which it feems that all Courts are final judges of contempts against themselves. Vide 4 Inft. 15, 17. 1 Sta. Tr. 89. 2 Sta. Tr. 617, 620. 3 Sta. Tr. 208. 7 Sta. Tr. 437. 11 Sta. Tr. 317. 2 Harek. ch. 15. fec. 72, 73, 74.

#### Parliament.

subject could not of right demand them in any criminal case: Then it was a doubt whether any writ of error lay upon a judgment given on a habeas corpus?

## 3. Coundell versus John.

[Hill. c Ann. B. R.]

Action lies, not for a falle return, but upon the fta-Wilfon 125. 2 Lev. 50, 86, 114, 250. 3 Reb. 25, 32. 7 Vent. 206. 2 Vent. 25. 7 Danv. 205. \*[505]

IN case; the plaintiff declared that he was elected member of parliament for such a borough, pursuant to the tom 7 & 8 W. 3. queen's writ, &c., and that the defendant returned two other persons to be elected, and that he the plaintiff pe-See 6 Mod. 45, titioned the House, and was adjudged by them to be duly 49. 1 Salk.19, titioned the House, and was adjudged by them to be duly 20. 5 Mod 311. elected, and his name ordered to be inferted in the return, Farefi. 13. Pol-baxf. 470. 3 Lev. guilty, the defendant moved in arrest of judgment, that here 29, 30. Lutw. guilty, the defendant moved in arrest of judgment, that here 28. 2 Sid. 168. is no cause of action; for it appears now, the plaintiff has had the effect of his election; he is returned; he has his place; there is nothing wanting wherein he can pretend himself injured, but the costs he has been at in the profecution; and as to them, it ought to be supposed, that the House considered of them. This was endeavoured to be made good upon the statute 7 & 8 W. 3. But Sir Tho. Parker, for the defendant, answered, That this declaration cannot be taken to be founded upon that statute, because the fact was laid not agreeable to it, nor was it fuch an action as was intended by the statute, which differs from a general action; for, first, an action grounded upon a general prohibition of a statute, ought not to be for the party only, but the queen and party tam quam; for a fine is due to the queen for the breach of the statute, as well as fatisfaction to the party injured. Et per Cur. Where a statute introduces a new law, by giving an action More there was none before, or by giving a new action in an old case, the plaintiff need not conclude contra formane

16. 190.1. Salk 212. Statuti. But if a statute gives the same action, with a difference of some circums are where there was none before, or by giving a new action difference of some circumstances, as double damages, &c. the plaintisf must either conclude contra formam statuti, or make his case so particularly within the statute, that it may appear to be so; and because he had not done it in this case, judgment was given for the defendant.

# Parson, Uscar, and Gurate.

Vide 2 Lev. 61. 3 I eon. Caf. 46 & 148. 4 Lcon. Caf. 367. Cro. Car. 105. Cro. El. 490.

#### Birch versus Wood.

[Hill. 10 W. 3. B. R.]

WOOD, pretending to be curate of a chapel of ease Curate is rein the parish of Presson, sued the vicar of the parish movable at the Spiritual Court, for the arrears of a pension claimed will of the parin the Spiritual Court, for the arrears of a pension claimed fon. Cases B. R. by prescription; and a prohibition was granted niss causa; 249. S. C. for that the curate was removable at the will of the parson, and so cannot prescribe, but his remedy must be by quan-

Vide Farest. 63. That parish-bounds are not to be proved Doug. 142. by the parfon.

Cowp. 437.

## Pauper.

Poor prisoners, vide poft. 521. 2 Lev. 142. 6 Mod. 22, 301.

### Anonymous.

[Mich. 9 Will. 3. B. R.]

A Pauper shall not pay costs, unless he be nonsuit; but Pauper shall pay then he shall pay costs, or be whipped; per Holt, C. J. See 1 Sid. 461. Quere tamen; for afterwards, in another term, I moved 6 Mod. 88. that a pauper might be whipped for non-payment of costs Fares! 114upon a nonfuit, and the motion was denied per Holt, C. J. 3 Salk. 207. faying, he had no officer for that purpose, and never knew it done. Note also: If a pauper gives notice of trial, and Vide Str. 983does not proceed, he shall be dispaupered.

Wile 24-

### 2. Anonymous.

[507]

[Mich. 11 Will. 3. B. R.]

MR. Northey moved to dispauper a parson, who was Dispaupering. Plaintiff in an action, because he had a living of 40 1. Programm. Turton and Gould, Justices, contra, because he **Iwore** 

fwore he was in debt more than it was worth. Holt, C. J. differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession.

Vide ante 442. 2 Lev. 201, 212. 6 Mod 30. Post. 519.

# Payment and Satisfaction. &c.

#### Mason versus Williams.

[In Canc.]

PENDING a bill in equity against an executor, or Executor may pay debts of a higher nature after a decree quod computet, an executor may pay any other debt of a higher nature, or as high a nature; after a decree quod computet, but this must be intended where he has legal assets; for if mot after final. he has only equitable affets, the Court will not indemnify See Cro. El 793. him, and fuffer him to prejudice and disappoint the first 2 And. 157. 1 Rol. Abr. 925; fuitor; and where there is a final decree against an execu-927. 1 Sid. 21. vaugh. 89. tor, and he pays a bond, it is a mispayment; for a decree 5 Co. 28. is in the nature of a judgment (a). Per Cowper, Lord 2 Chan. Caf. 54, Chancellor. 84. 2 Vern. 299. Prec. Chan. 79. 1 Vez. 214.

(a) This is only true fo far as re- v. Bank of England, Temp. Talb. 222. lates to personal estate, Bligh v. Lord Aftley v. Powis, 1 Vez. 496. Darnley, 2 P. Wms. 621. Vide Morrice

### Carter versus Sheppard.

[Pasch, 10 Will. 3. B. R.]

\*[ 508 ] A. receives money of B. by the hands of C., it is A.'s money, and he mu See 6 Mod. 36. 2 Salk. 442. 5 Mod. 2,8; S. C. Comb. 475. Cafes B.R. 3 Mod. 86. 3 Lev. 299. 2 Show. 296,

TPON a point referred at nish prius, the case was, H. having a note of 100 l. upon a goldsmith, goes to receive it: While he is in the shop, one Daly brought money in to pay to the goldsmith, who thereupon orders H. to abide by the loss. receive the money of Daly; accordingly H. receives 50 1. part of his hundred, pulls a bag out of his pocket, puts the money into the bag, lays it down by him, and proceeds to tell the rest; in the mean time \* a stranger comes 289. Vide ante in, catches the bag of 50 l. from him, and runs away. H.
442, sec. ib. brings trover against the andsmith for his note. brings trover against the goldsmith for his note, pretending the property of the 50 l. remained in the goldsmith, though put into the plaintiff's bag; for he had still a right to count

it over, and so it was not absolutely paid to the plaintiff. 297. Molloy is Cur. contra: H. had appropriated the money, by putting 2.c. 10. Comb. it into his bag, and might bring trover for the bag and 154. 2 Mod. 23. money, as well as if he had put both bag and money into 24. his pocket.

## Marle versus Make.

[Trin. 13 Will. 3. B. R.]

PAYMENT to a bond with condition indorfed, is a Payment before good plea before breach, but not afterwards, no more Vide Lutw. 472, than to an action of debt upon a fingle bill; for the bene473. 5 Co. 117.

fit of the condition is loft when the breach is made (a).

S. C. Holt 122. Per Holt, C. J. 2 Wilson 150. 2 Stran. 994.

(4) But now, by stat. 4 and 5 Ann. before the action brought, it may be f. 26., if the money is paid any time pleaded.

### 4. Cranmer's Case.

[In Canc.]

RS. Fifter was indebted in 50 /. to Cranmer, and left Legacy to a crehim a legacy of 500 %, and made him executor, and, less than the after the making of her will, borrowed 150 % more of him, debt, how to be died. The Master of the Rolls decreed that this legacy taken. Vide should be a fatisfaction of both the debts, that contracted Peacock. Ante after the will, as well as that contracted before; but Har- 155, 415, 436.

Contract the will, as well as that contracted before; but Har- 155, 415, 436. court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legrey, we cannot contradict him, and say he pays a debt; and as to the debt contracted afterwards, he faid there was no pretence to make this to be a payment of that: If 2 legacy be less than the debt, it was never held to go in fatasfaction; so if the thing given was of a different nature, as Land, it should not go in satisfaction of money; so if Videz Atk. 300. legacy be upon condition, for by the breach he may be 3 Atk. 65.

Legacy be upon condition, for by the breach he may be 3 Atk. 65.

Legacy be upon condition, for by the breach he may be 3 Atk. 65.

Legacy be upon condition, for by the breach he may be 3 Atk. 65. In all these cases the intention of the party ought to be the 2 Ver. 617, 635.

Vide also, note nde.

on this point,

ayment to the sheriff on a fi. fa. is good, not so to the 1 Salk. 155. 30 Ler. 2 Lev. 203.

Where payment to the plaintiff by the bail is a discharge.

de; Payment was formerly no plea to a sci. fa. on a ment in debt, but now it is by the stat 4 & 5 Ann. 4. 3 Lev. 19, 20.

Vide Parliament Cafes, pag. 1 to gr. Farell. 15, 384 r Chan. Čal. 221. 2 Chan. Caf. 163, 2:4.

## Beers of the Realm.

## Rex & Regina versus Knollys.

[Trin. 6 W. & M. B. R. 1 Ld. Raym. 10. S. C.]

Ante 47. S. C. Poft. 412. 3 Salk. 242. Čarth. 297. Comb. 273. Skin. 335, 517. Cafes B. R. 55. Holt 530. Trem. 11. 8 S. T. 50, 58.

INDICTMENT was found at Hicks's Hall against Charles Knollys, for the murder of Captain Lawfon, which was removed into B. R.. The defendant pleaded in abatement, that William Knollys, Viscount Wallingford, by letters patent under the great seal of England, which he produced in court, bearing date August 18., 2 Car. 1., was created Earl of Banbury, to him and the heirs-male of his body: That William had iffue Nicholas, who fucceeded him in the faid title; and that the faid honour descended to him the defendant from the said Nicholas, as son and heir: Et hoc paratus est verificare. It was replied, that 14 Decemb. 4 W. & M., the said defendant petitioned the lords then affembled in parliament, to be tried by his peers, and the lords disallowed his peerage, and dismissed the petition.

The defendant demurred, and the attorney-general

joined in demurrer.

The first point considered per Holt, C. J. was, What an.

earldom was, and wherein it confifted?

Before the time of Ed. 3. there were but two titles of nobility, viz. earls and barons.

Barons were originally created by tenure, afterwards by writ, and last of all by patent; scil. about 11 R. 2.

As to earls, 1st, They were always created by letters-

patent. Vide Seld. 536.

adly, An earldom confisted in office for the defence of the kingdom. Vide Bract. lib. 1. c. 8. Comites had their name, not from counties, but a comitando regem. 9 Co. 49. It may be entailed as any other office may, within

3dly, Earldoms confift of rent and possessions, &c., which were anciently great. Vide mag. char. The relief of his heir is 100 l. This being premised, he went on to

Ist, That it is not alleged by the defendant that he is. unus parium regni Anglia, but only unus parium regni; vor is Banbury alleged to be in England, and an Irish peer may be made under the great seal of England.

Baron.

Earl, his creation and office. Note; In the Saxon times the earls of counties being officiary, were elected by the freeholders in their folkmotes, Weftm. 2. and were removable for male administration. Vide LL. Edw. c. 35. Ll. Eadgari, c. 5. LL. consider the objections: Canuti, c. 17. and Saxon Chron. fub anno 1055.

To

To this he answered, That the great seal of England King may create is appropriated to England, and what is done under it has der the great feat relation to England, and to no other place; and though of England, by the king may create an Irish peer under his great seal of express words. England, yet that must be by express words, being by spe- 2 Veat. 4. cial act of prerogative. An act of parliament does not extend to Ireland, unless particularly named; and it is a foreign intendment to suppose him an Irish peer, and therefore is to be rejected.

The place from whence an earl takes his title, is not Place whence material; it is not necessary there should be such a place title is taken, in England, or indeed any where. Albemarle is not in not material. England, and there is really no such place as Rivers, 13 & 14 Ed. n.

though we have an earl of that name.

adly, It is objected, That the defendant ought to have concluded his plea, with prout patet per recordum, and have

produced a writ to certify the discents.

As to the writ to certify the discents, that is not of necessity, but used merely for expedition; and if his peerage had been created by writ, then it would have been triable by the record, and this a fatal exception: But letters patent may be pleaded and shewn to the Court, and the adverse party cannot deny them: And as this case is, here being discents, if the defendant had concluded as the ting's counsel say he should, it would have been an impracticable conclusion, and consequently void. And in the precedents cited of the other side, there were no letters patent pleaded; nor could there in this case be any fuch iffue as earl, or not earl; for the letters patent under the great feal could not be denied or questioned, but by pleading non concessit.

3dly, That the defendant is concluded of his peerage

by the order of the House of Lords.

To this Eyre, J. said, The defendant had a title to his House of Lords honour by legal conveyance, and that it was under the cannot deprive of peerage. Parprotection of the common law, and could not be taken liament Cas. 2, from him but by legal means. That the House of Lords 3, ec. could no more deprive one of a peerage, than they could confer a peerage. That the defendant's right stood upon the letters patent, and his legitimacy; that the letters Patent could not be cancelled without a scire facias; and that the defendant could not now be proved a bastard, or illegitimate.

Holi, C. J. gave these reasons: 1st, That this order Judicial power of was not a judgment of parliament; the parliament con-parliament is in filts of the king, the lords spiritual and temporal, and the is virtually the commons. The judicial power is in the lords only; yet judgment of the legally and virtually it is the judgment of the king, if not king. All justification from the commons; and write of error in parliament are the crown. Vol. II. Power

power of jurisdiction is derived from the king; if that be an author to be credited.

House of Peers has a double authority. \*[511]

\* The House of Lords has a double authority, as parliament and the course of the house, between which we must distinguish by their style. Journals are no records of parliament, and therefore we cannot take notice of them. Hob. 110. King and Hunsdown versus Arundal and Howard. Judgments ought to be given in their proper style; and therefore if this Court, which is coram rege, enter judgment per justiciarios de B. R. it is void.

But no original juri (di dion over a cause

The House of Lords has no jurisdiction over an original cause mixed with matter of fact; because, 1st, that mixed with fact. supreme court is the dernier resort; besides that, for the most part, original causes are mixed with matter of fact, and it is below the dignity of so supreme a judicature to try a matter of fact. It is for this reason, error in fact, in the Court of King's Bench, must of necessity be redressed before the judges of this Court. 2dly, If the parliament should take cognizance of original causes, the fubject would lose his appeal, so much indulged by the common law in all cases. Causes come not thither, till they have tried all other judicatures. For this reason, within these four years, judgment was given against the earl of Macclesfield in the Exchequer; he brought error in House of Lords, the House of Lords; and the question was, Whether by 31 Eliz. 3. the Exchequer-chamber should not interpose? And the writ was abated; and it was held, that the Exchequer-chamber should interpose. This dignity is a title by common law; and if a patentee be disturbed of his dignity, the regular course is, to petition the king, who in-Where a patentee dorles it, and fends it into the Chancery. Vide Staundf. Prerog. 72. 22 E. 3. 5. Long 5° E. 4. 117. The king could give precedency by the common law, but is bound by 31 H. S. c. 10.

Court of Exc equer to the

is disturbed of

proceed.

dignity, how to

When error lies

not from the

If a peer commits treason, he must be tried by his peers, and they may order a trial; but the king may choose whether he will make a high steward.

adly, No plea was depending in the House of Lords; for the defendant did not petition to enjoy, but supposed himfelf in possession.

4thly, Here was no judgment. A Court can give no judgment in a thing not depending, or that does not come in a judicial way before that Court: Here the title of the earldom was not before them. If trespass be brought for a trespats done in the ground belonging to a bouse, and it appears at the trial the plaintiff has no title to the house, yet the Court cannot give judgment to turn him out.

Judgment must be complete and :crmal.

5thly, A judgment ought to be complete and formal. If a quo warranto be brought for usurping royal franchises, and the Court give their opinion that the defendant has

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no title; yet unless they go on, et quod ab inde excludatur, Ur. it is nothing. So in the case of Lovell, 2 Cro. 284. In debt on an obligation the defendant pleaded a bar by verdict and judgment in a former action wherein the entry was, that the defendant should recover costs, et quod eat inde fine die : Here, because there was no judgment, quod Dismission is up querms nil capiat per breve, it was adjudged naught; for judgment. dismission is no judgment in a court of law.

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Objection: It is faid that this judgment was given fe-

cundum legem parliamenti.

Answ. Lex parliamenti must be looked on as the law of Lex Parliamenti. the kingdom; but admitting it were a particular law, yet Ant. 503, 504. if a question arises determinable in the King's Bench, the

King's Bench must determine it. Vide Dy. 60.

14 Car. 2. C. B. Binion versus Eveling. Filing an ori- Vi. ft. 12 & 13 ginal against a parliament-man was adjudged to be no 10 G. 3. c. 3. and 10 G. 3. c. 5. breach of privilege. If a man be committed by parliament, and the parliament is prorogued, this Court will grant a habeas corpus. But no precedent hath been shewn Inheritances not to warrant the determining inheritances originally per minable in par-legem parliamenti; if it be so determinable, it must be by liament. act of parliament, but there is no such; or by custom, but there is no such custom. But if inheritances were determinable in parliament, without their having jurisdiction, they would have uncontrollable power, and res est mistra, ubi jus est vagum. And he concluded that judgment should be given for the defendant, and accordingly the indictment was abated: So the defendant was not tried for the murder at all.

## Lord Banbury's Cafe.

[Paich. 5 Ann. B. R. 2 Ld. Raym. 1247. S. C.]

ORD Banbury was taken on a latitat fued against him H. stressed by the name of Charles Knollys, Esq. and it was now commoner, the moved for a supersedeas, offering to shew the letters patent Court will not of creation, and an affidavit that he was the person; and try whether a it was agreed, That if the latitat had been fued against a motion. Vide him by the name of lord, it should have been superseded; anter 451, 509. for the law supposes a peer able to answer the demand of Parl. Cases, 2, 3, any personal action, and the body is only liable for want 38. Rep. B. R. of being responsible in substance: And if he had sat in Temp. Hard. 34. parliament by virtue of any writ of lummons, and had 2 Str. 985. been fued as Charles Knollys; but not having fat in parliament, they could not take notice of his peerage, and would not proceed to try it on a motion.

#### Sir Thomas Meers contra Lord Stourton.

#### [In Canc.]

Where a peer hal depole on eath or honour. 7 Will. Rep. 146. 3. C. 513

SIR Thomas Meers exhibited a bill against the lord Stourton, and it was ordered that the lord Stourton should be examined upon interrogatories touching his title; and it was objected, that he being a peer of the realm, ought to answer upon his honour only; and it was ruled by Harcourt, Lord Keeper, that where a peer is to answer to a bill, his answer put in upon his honour is sufficient (a); but where a peer is to answer interrogatories, to make an affidavit, or be examined as a witness, he must be upon his oath.

(a) Janes 154.

See Farel. 101. 2 Show. 1, 2. 165,486.3 Mod. 116,134.6 Mod. 176,168.5 Mod. 343 and 348. I Hawk. P. C. cap. 69.

# Beriury.

### Dominus Rex versus Greepe.

5 Mod. 343.
S. C. Carth.
421. Holt 535. [Mich. 9 Will. 3. B. R. 1 Ld. Raym. 256. S. C. Comyns Comb. 459.

A2. S. C.] 43. S. C.)

Inuendo. Vide Yel. 12. Cro. El. 497. Hob. 174. Aleya 39, 92. I Vent 53, 54. 3 Lev. 69, 166. Innuendo mayexplain or apply, but cannot add to, or change the sense. Carth. 421. S.C. 5 Mod. 233. 4 Rep. 17. Comb. 459. S.C. 3 Bu'ft. 265. 1 Built. 183.

A N information for perjury set forth, that the defendant, upon giving a lease and release in evidence in a certain cause, bearing date the 15th and 16th of July 1681, 2,5, 45, 461. Certain cause, nearing date the 15th and 10th of fary 1002, Hut. 95. Heth executed at Albemarle-bouse, to which Mr. Strond was witness, swore that Mr. Strond was, the middle of July 317. 1 Sid. 52. 1611, at Newnham, innuendo Newnham in Devonsbire, ubi 2 Show 305 and revera non fuit apud N. predist. A verdict was for the king, but judgment was arrested; and it was held,

1st, That Newnham was but an individuum vagum without the innuendo, and might be as well Newnham in Middiefex as Newnbow in Devensbire, or some far distant place: And if Newnbern was at the next door, Streud might be at Newnham, and yet be at Albemarle-bouse in Middlesen too in the middle of July.

2dly, That the innuendo could not restrain the individuam vagum to Newnham in Devonshire; for it is no averment, but in the nature of a predict. It may ferve for an expla-

nation to point out where there is precedent matter, but never for a new charge: It may apply what is already exprefied, but cannot add or enlarge, or change the fense of the precedent words: So here, the word Newnbam did not import Newnbam in Devensbire; ergo the innuendo cannot enlarge the importance of it, and make it so fignificant. Vile by 333. 3 Cro. 428. Goldfb. 191. Hob. 3, 6. 45. Vi. 1T. R. 7c. 1 Ra 82, 83, 84. 2 Bul. 81, 82. 1 Ven. 337. Hutt. 44. 11. 950. C

4 Cs. 20. Telv. 21. 1 Gro. 321. A. 32.

\*3dly, That a man ought not to be drawn into a con-Perjury may be structive perjury; and that if the matter of this oath was in evidence to certain, it is material to the iffue, and sufficient to be perjury; and Holt, C. J. denied Golds. 191., and held, that if 168. a man gives evidence to the credit of a witness, though # [514]

this be not the issue, yet it is perjury.

4thly, As to the objection, that this was an informa- Charge ought to tion at common law, and not on the statute, that makes at common law, no difference as to the certainty of the charge; for it is and on the statute. so more infamous now than it was at common law; the tute. difference is only, that where H. is convict upon the sta- Where H. is contute, it is part of the judgment to be disabled; but at vid on the statute, disability is common law it is only a consequential disability: Ergo, part of the judgein the latter case the king may pardon, and that rement; at come flores him to his testimony; otherwise in the former, only a consefor in that case he must reverse the judgment, or cannot quence. Vide be restored.

ante 461. Poft 649, 691.

• It appears by the report in in B. R. was reversed in the House of Lord Reymond, that the judgment Lords.

# Pleas and Pleadings.

Vide ante Abatement, Demursers, Juftification, &c. p. 496.

#### 1. Anonymous.

[Mich. 1 W. & M. B. R.]

I P a man be bound by recognizance to appear the first Upon an informaday of the term, and is charged upon his appearance fex, the defendwith an information, in case the information be laid in ant shall have the Middlefex, the party has time to plead during all that term, term to plead; fo that it cannot come to trial in the term; but in case it till next term. be laid in any other county, the party shall have time to Post 624, 650. plead till the next term, for he is as much concerned to Mod. Cales 22.

defend 1 Salk. 219.

defend himself in those cases as in any civil action; and fince the law allows him counsel, the law allows him time likewise to consult with them; for not to allow the means of defence, is to take away the subject's defence; otherwife it is of capital offences: But note; In these cases there is no counsel. Also where the party comes in by cepi cerpus, or upon an outlawry, he shall plead presently, for then he has been guilty of a contempt. Per Cur. Contrary to the case of the seven bishops.

Time to plead, vide post, pl. 3, 4.

#### [515] Vi. 2 Lev. 12,75.

#### Woodward versus Cliff.

[Pasch. 2 W. & M. B. R.]

Poft 589, 699. 2 Lev. 74, 75. 1 Sid. 375.

Testatum existic IN covenant, the plaintiff declared that he was seized in fee, and that by indenture made between the plaintiff and Eliz. his wife ex una parte, and the defendant of the 2 Saund. 273. other part, testatum existit that the pianting and that the hus-195. 2 Cro. 383, miled. It was objected, that it being met and wife could not de-537. Cro. Car. band was fole scised, the husband and wife could not de-188. 2 Leon. 64 mise; sed non allocatur; for it is not affirmed, but only that by the indenture it is witnessed, for the testatum is a rehearfal of that.

## Hall versus Englestone. [Mich. 8 Will. 3. B. R.]

Difference between time to plead on a ha-Leas corpus and a capias. Ante, pl. 1. Post, p'. 15. Vice 2 Will. 393.

U PON a habeas corpus returnable in Michaelmas term, if the declaration be delivered before crastinum animarum, the defendant must plead to try; but upon a cepi corpus he is only to plead to enter. So in Easter term, if the declaration be delivered before menf. Pasche, the defendant on a habeas corpus must plead to try; upon a repi corpus to enter only.

### 4. Anonymous.

[Mich. 8 Will. 3. B. R.]

F a declaration be delivered against one in custody, he shall have the whole term to plead in abatement.

### 5. Anonymous.

[Mich. 8 Will. 3. B. R.]

BEFORE joinder in demurrer, the defendant may Waiver of spewaive his special plea, and plead the general issue; cial pleadings. per Cur. But if there be a rule to plead, so as to stand by it, and the defendant pleads a special plea, as he may, and the plaintiff demurs, the plaintiff [defendant] shall not then waive and plead the general iffue (a).

(a) The defendant was refused the liberty to waive a sham plea and plead the general issue, Ellis v. -2 Will. 369. So a special plea, after the intervention of a term, the plainsiff's only witness on the general issue having gone abroad fince iffue joined, Freeman v. Jones, 2 Wilf. 391. If a defendant pleads a special plea, and is ruled to plead such a plea as he will abide by; if he waives the special

plea, he can only plead the general issue, Hare v. Lloyd, Prout v. Dewar, 1 T. R. 693.; but he may give notice of set-off, note ibid. In the Common Pleas the defendant must always abide by his plea, Imp. C. B. 308. Cooper v. Mansfield. The Court will give the defendant leave to withdraw the general issue, and plead it again with a special plea to let in the real merits, Wilkes v. Wood, 2 Wilf. 204.

#### 6. Pierce versus Blake.

[Hill. 8 Will. 3. B. R.]

THE defendant pleaded a false plea in abatement, viz. Attorny fined for affiguing that the plaintiff was dead; the Court was moved, for affiguing e rors notoriously that the attorney might be compelled to swear it. Et per sale and frivo-Holt, C. J. We cannot compel him in any case to swear lous. S.C. Holts his plea, but where it is a foreign plea; but the attorney, 20, 202. Lutw. if he puts in a false plea to delay justice, breaks his oath, Rep. 236. Styl. and may be fined for putting a deceit upon the Court. 225. Sid. 329. and may be fined for putting a deceit upon the Court. a Saund. 97, cs.

He remembered a case where judgment was given against # [516] a defendant above forty years of age, upon which judgment he brought a writ of error, and assigned infancy, and appearing by attorney for error, and the Court fined the attorney: In the principal case the Court ordered the attorney to plead immediately, so as he would stand by it; or the Court, if he did not, would inquire into the truth of the plea, and, if they found a deceit and a trick, they would fine him.

Note; The Court will not order a man to plead peremptorily till the rules be out.

#### Brown versus Cornish.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 217. S. C.]

Onerari non debet proper only where there never was a charge.

Carth. 88.

INDEBITATUS assumptit and quantum meruit for 20 1. The defendant pleaded onerari non debet, because he paid the money at the time, &c., et boc paratus est verificare; the plaintiff demurred. Et per Holt, C. J. 1st. This plea does not amount to the general issue, because it admits the cause of action (a). 2dly, Onerari name debet is no plea here, because he allows the promise to be a good promise, but avoids it by matter of discharge ex post facto; in this case he should have pleaded actionem non. But where the matter of the plea shews there never was a good cause of action, onerari non debet may be proper; thus in debt on a bond, defendant may plead onerari non debet quia riens per descent. 3dly, The plea was misconcluded. Vide 1 And. 20. for he ought to conclude to the country.

- (a) Vide ante 344. Skin. 362. Cro. Eliz. 262.
- Ashton versus Sherman. Mich. 9 Will. g. B. R. Vide this Case, title Executors, pl. 10. page 298.

#### g. Anonymous.

[Mich. 9 Will. 1. B. R.]

ment.

Ples after judg. I F judgment in ejectment be figned in a country cause ment in eject. I for want of a plea, but no possession delivered, a judge in his chamber, at any time before the affizes, may compel the plaintiff to accept a plea; but if possession be delivered, he is without remedy; per Holt, C. J.

## [517]

Gray versus Hart.

[Hill. 9 Will. 3. B. R.]

not enough to thew where returnable, but

In justifying un- I N affault and battery, the defendant pleaded a writ to der a writ, it is the sheriff returnable in C. P. the sheriff returnable in C. B., and a warrant to him to arrest the plaintiff, &c., and did not shew from what court the writ issued; and it was held naught; for it might be a writ out of the King's Bench or the County Palatine. whence it issued. and they would not intend it a writ out of Chancery: So 1488. N. L. 470. if H. plead a judgment, he must shew in what Court; for Cro. Eliz. 504. to put the adverse party to search in every court, would be

### 11. Anonymous.

[Mich. 10 Will. 3. B. R.]

HE Court resented the number of frivolous sham sham please. pleas which came before them, faying, it was against the duty of counsel, and against the statute W. I. c. 29., and that the old rule ought to be revived, viz. that coun- Vide 2 Will should set their hands to the books delivered to the 169. andges, which was anciently so ordered, that the Court ight not be troubled with frivolous pleas.

#### Pasmore versus Serj. Goodwin.

[Trin, 11 W. 3. B. R.]

SERJEANT Darnel moved for an imparlance till the Upon bills filed next term, because the defendance next term, because the defendant was an officer of the against officers it court, and the bill was not filed against him, so as to give there be four him eight days within term to plead; but the Court held, days within term that the day of the bill filed is one day, so that the plain- to plead. Vide tiff may give rules that day; also they agreed, that Sun- ib. Comberb 19, days and holidays are to be reckoned in: And the clerks 251,253. Farefl. faid it was fufficient that he had four days in term, quod 62. Str. 86. Curia concessit; Mr Clark said, that anciently there were two rules given, both four-day rules; the first was ad respendendum, the second ad respondendum peremptorie, which two were now turned into one eight-days rule (a).

(e) It is now only four days inclusive, 2 Str. 1192.

### 13. Anonymous.

[Trin. 11 Will. 3. B. R.]

THE question was, Whether there ought to be new No new rules to rules to plead upon an amendment? Pew, clerk of plead after an the papers, faid, that if the plea was of another term, less an imparlthere ought to be new rules; otherwise if it be a plea of sace be given. the same term, because there is a rule to warrant the judg- Post. pl. 20. ment. Holt, C. J. Anciently they did not plead de novo after an amendment; therefore giving rules to plead again, cannot be the ancient course; because the practice of pleading do novo is but of late introduced, but with great reason: When the plaintist amends and gives an imparlance, there should be new rules; otherwise not.

See 1 Salk. 47. Information amended after plea pleaded. Quer.

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## 14. Wood versus Cleveland.

[Pasch. 12 Will. 3. B. R.]

Judgment fot afide though friedly regular, in order to try the meits. Vide 6 Mod. 191, 241. 1 Salk. 390, 401. 1 Mod. 1. Farefl. 3. I Rol. Abr. 774. pl. 1. Cro. Car. 443. Hob. 104. 5. C. Holt 560.

IN a common action of trespals, the plaintiff signed his judgment for want of a plea; the desendant after term, and before the assizes, offered him a special plea, or to plead the general issue, provided the plaintiss would confent to enter into a rule, that he should at the trial be allowed to give special matter in evidence; the plaintiss refused, and executed a writ of inquiry. And now Sir Bartholomew Shower moved, that upon paying costs the judgment might be set aside, and the plaintiss obliged to accept their plea and go to trial, the plea being sair and containing special matter of title. The motion was granted; for per Holt, C. J. where the desendant's plea was a sair plea, and no delay assected, we will interpose; otherwise where a plea contains special matter that is questionable, and was designed to draw the plaintiss to demur.

#### 15. Anonymous.

[Trin. 12 Will. 3. B. R.]

Str. 8°3. Barnes 242 1 Bur. 568. From the detendant thall picad after a voluntary a, pearance.

THERE was a queition, in a money rily before memfem Pascha in Easter term, whether he. be obliged to plead to enter? Sir Samuel After and Mr. Clark were of opinion he was not. But per Holt, C .. J. There is uo difference between a voluntary appearance and an appearance upon a cepi corpus; for a voluntary appearance is not good, unless a writ hath been taken out: And there is no reason for it; for if the plaintiff be content with a voluntary appearance in case of the desendant, there is no reason why the plaintist should be in a worse condition than if he had arrested him. Let the rule be, if a writ be taken out, and the defendant agrees to appear, he shall appear and plead according to the return of the writ, and if the return be before mensem Pasche, he shall plead to enter; but if no writ were taken out, he shall not be obliged to appear; but if a writ were taken out returnable after mensem Pascha, he shall have an imparlance till next term,

Vide ante, pl. 1 and 3.

#### Peirce versus Paxton.

Vide ante 508. 2 Lev. 212.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 691. S. C.]

N debt on a bond, the defendant puis darrein continuance Payment of part, pleaded payment of part, and an acquittance in abate—
ment. Upon demurrer, Holt, C. J. held it a plea in bar, rein continuance
and not in abatement. Vide 3 Cro. 342. Al. 63, 65. is in bar. S. C.
3 Cro. 157. What is a bar before the action brought, is
as much a bar after, for time makes no difference in the
nature of the thing. Vide 7 E. 4. 15. Sty. 212. is a dark
Lutw. 1177,

Takes. For the thory into part difference for the continuance in a decention of the continuance in and acquittance in abate—
pleaded payment of part, and an acquittance in abate—
pleaded puis darrein continuance
is in bar, set in continuance
is in bar cafe. Entry into part differs; for that is without the confent of the plaintiff [defendant]. But the plea is not good, because the acquittance is a deed, and ought to be pleaded with a profert (a). Judgment to answer after.

(a) This is aided, except upon special demurrer, 4 and 5 Ann. c. 16.

#### 17. Anonymous.

[Trin. 13 Will. 3. B. R.]

IF an act of parliament makes writing necessary to a Where a flatute common law matter, where it was not necessary by thing in writing, the common law, you need not plead the thing to be in it must be so writing, but give it in evidence, but where a thing is ori- pleaded; but ginally made by act of parliament, and required to be in where it only adds it to a comwriting, you must plead it with all the circumstances re- mon law matter, quired by the act; as upon the statute of H. 8. of wills, it needs not be you must plead a will to be in writing; but a collateral claration, but in promise, which is required to be in writing by the statute a plea it must. of frauds, you need not plead to be in writing, though Raym. 450.
Lutw. 1425. you must prove it so in evidence (a). Per Holt, C. J.

I Lev. S1. Cro. Eliz. 438. Bull. N. P. 279.

(a) In Villars v. Handley, 2 Wilf. 49. a plea that an heir had nothing but the reversion expectant on a term of 500 years commencing anno 1746, was held ill; beause it did not thate

the term to be created in writing, [the report says by deed,] according to the statute of frauds. But this case does not appear to have been cited.

#### 18. Anonymous.

[Trin. 13 Will. 3. B. R.]

F a man pleads over, he shall never take advantage of Nething can be any flip committed in the pleading of the other fide, of on a plea over which he could not take advantage of upon a general de- which could not murrer. Per Holt, C. J. See 6 Mod. 136.

on a general demurrer. Vide

3 Wilf. 297. 8 Co. 120. b.

#### Anonymous. 19.

[Trin. 1 Ann. B. R.]

ant cannot plead

After bail-bond IF a man has forfeited his bail-bond, and so is in mifeforfeited, defendricordia, and the Court in favour of him stay proceedin abatement in ings thereupon, he cannot afterwards plead in abatement the original ac- to the original action, but must plead in chief.

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#### Anonymous. 20.

[Mich. 2 Ann. B. R.]

BY the course of the Court, if the plaintiff moves to A mendment. Ante, pl. 13. amend his declaration the same term the defendant's plea comes in, she plaintiff need not give new rules to Vide 2 Bl. Rep. plead; but the defendant must plead in convenient time. 785.

3 Salk. 47.

#### Anonymous. 21.

[Mich. 2 Ann. B.R.]

Resson of ain paper.

Resion of a- SINCE pleading in paper is now introduced instead of mendment while the old way of pleading ore tenus at the bar; it is but reasonable after a plea to issue, or demurrer joined, that upon payment of costs the parties should have liberty to amend their plea, or to waive their plea or demurrer while all the proceedings are in paper.

S C 1 Salk. 208. 6 Mod. 157,

### Fanshaw versus Morrison.

197. Ante 208. [Pasch. 4 Ann. B. R. z Ld. Raym. 1138. S. C. with other points.]

2 Lev. 7.

Scire facias upon SCIRE facias upon a recognizance entered before a recognizance of judge of the Common Pleas, upon a writ of error of See 6 Mod. 159. a judgment given in that Court in debt, conditioned that 2 Saund. 3, 6. if the plaintiff should be nonfuit, the writ of error discontinued, or judgment affirmed, that then he should pay, &c. The defendant prayed over, and pleaded that the plaintiff in error did profecute the writ of error, and affigned errors, et quod placitum super prædict. breve de errore adhuc pendet indeterminat', &c. The plaintiff replied, that must be pleaded the judgment was affirmed, absque has quod placitum pendet indeterminat, &c. The defendant demurred, and judgotherwise of ex- ment was given for the plaintiff in C. B., and now upon cuse. Lutw. 419, a writ of error, the Court held, that where a man pleads a performance, he ought to plead it in the words of the condition

Performance in the words of the condition; 420, 471, &c. : Lev. 245.

condition of the bond. 3 Lev. 293. 2 Ven. 221. Dy. 243. 1 Lev. 145, 303. but otherwise where he pleads an excuse; and that the Negative plea desendant's plea is an excuse in this case, and therefore it clude prout patet was not necessary to plead that the plaintiff in the writ of per record. 3 Lev. error was not nonsuit, nor the writ discontinued, nor the 152, 311. 5 Mod. jadgment affirmed; but that errors were assigned, 5 212. 1 Lutw. placit. inde pendet indeterminat ..

2dly, The Court held this plea was in the negative, Farell 106. and therefore there was no occasion for the defendant to conclude with a prout patet per recordum: But the plaintiff 2Rol. Abr. 275. ought upon this plea to have replied, that the record was certified in B. R. such a term, Et quod superinde talit. proceff. fuit quod judicium affirmat. fuit prout patet per recordem; to which, if it was not so, the defendant might re-

join mul tiel record.

3dly, The Court held the replication naught; 1st, Beany, the Court held the replication haught; it, because it makes that matter of inducement which should puts matter of have been the point in issue; and, 2dly, Because the tra- record in issue to refe puts a matter of record in iffue to be tried by the the country, is ill. Raym. 50.

Tountry. And upon this the Court were going to reverse Vid. 1 Saund. 20, The judgment, but an exception was started to the writ of 99. Lutw. 633, error, for which it was quashed (a).

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ria8, and Huttler versus Raines, ib. 1401. 1 Lev. 193.

(a) Nate; It appears by the report judgment fuper quaddam breve nostrum in Lord Raymond, that the reason of the writ being quashed was, that it peared by the record to have been given in the reign of King William.

23. Domina Regina versus Rawlins. 3 Ann. B. R. Vide this Case, title Imparlance, pl. 3. ante 367. When the defendant ought to plead to an information.

### , 24. Turner versus Beale.

[Pach. 5 Ann. B. R. 2 Ld. Raym. 1262. S. C. Pleadings, 3 Ld. Raym. 350.]

offumpfit, the defendant cognovit actionem; but in bar Plea upon the of execution as to his person, apparel, bedding, tools, statute for difpleaded 2 & 3 Ann. c. 16., and shewed that he was after ally a prisoner in the Marshalfea, and that being there to shew all qualitiel Jour & ann, he was debito modo discharged by the just fications and cirtice at such a sessions, juxta formam statuti. To this it bring the deelemurred; and infifted, that it did not appear that he fendant within the act. Vide ante 315, 506. dice and discharge prisoners without seeking, or whe- Mod. Cases 22,

prisoners, ought ther 301. S. C. Mult 565, 566.

ther they will or not; and the defendant ought to shew his qualifications, and that he is within the benefit of the act, and it ought not to be put upon the plaintiff, who is a stranger, to shew that he was not qualified. Mr. Eyre contra urged, that all was aided by junta formam fla-tuti. Vide 1 Cro. 314. 2 Cro. 609. Holt, C. J. The Mod. 47. Sav. sessions cannot intermeddle, but upon application: You 58. 3 T. R. 636. mult thew your discharge, and that it was regular and not deficient; the plaintiff is a stranger, and it is not to come on his side that the discharge was deficient, but you must thew the whole matter, and give him an opportunity to traverse it. Judgment for the plaintiff.

Vide Plowd. 376. tuti.

### 25. Woodrington versus Deverill.

[Hill. c Ann. B. R.]

S. C. Holt 567. Vide ante 441. Dr. & St. 130. Bro. Attach. 32, 58, &c.

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AFTERWARDS, Hill. 5 Ann., inter Woodrington and Deverill, in debt on a bond, the same case happened as before, and then the case last mentioned was rement, 20. 4 Co. membered, and without pretending to make good the plea in form, the statute of amendment of the law, 4 & 5 Ann. c. 16., was infifted on, viz. that judgment shall be given as the right appears, &c. Pengelly for the plaintiff faid, that here appeared no sufficient discharge, but a good cause of action for the plaintiff. Powell, J. faid, that act did not help substance; that if this fort of pleading be made good, the Court can never know when particular jurisdictions act with authority, and when not; quod Hult, C. J. conceffit, faying, this exposition was to take the party's issue from him.

## Pledge and Bailment.

#### Anonymous.

[Pasch. 5 W. & M. B. R. 2 Ld. Raym. 912, 913, &c.]

Pawn-br ks, and 379 contral F a pawn-broker refuses, upon tender of the money, to re-deliver the goods pledged, he may be indicted; for being fecretly pawned, it may be impossible to prove a delivery in trover, for want of witnesses. Per Hole, C. J. and Erre, J.

Vadium,

Vadium, a pawn or pledge. In this case the pawnee Pawn, guid. Lit. hath a property, for the thing is a security to the pawnee Rep. 332. that he shall be repaid his debt, and to compel the pawner Keilw. 52. to pay it.

Now, if the pawn be fomewhat that will be the worse And how to be for wearing, as clothes, &c., the pawnee cannot use it.

But if it be somewhat that will not be the worse for 4 Co. 3, 38. wearing, &c., as jewels, &c., the pawnee may use them, Co. Lit. 89 but then it must be at peril; for if the pawnee is robbed Owen 124. in wearing them, he is answerable; and the reason is, be- 2 Cro. 224. cause the pawn is so far in the nature of a depositum, that it carnnot be used but at the peril of the pawnee; and the using occasioned the loss. Vide Owen 423. But if the pawn is laid up, and the pawnee is robbed, the pawnee is not answerable.

Alfo, if the pawn be of fuch a nature, that the keeping is of charge to the pawnee, as if it be a cow or a horse, the pawnee may milk the cow or ride the horse; and this is an recompence of the keeping.

If a creditor takes a pawn, he is bound to restore it upon Pay ment of the debt; but if his care in keeping it be exact, 4 Co. 3%. Year and the pawn is lost, he shall be excused, for there is no 178. Co. Lit. default in him.

And in case the pawn be lost, the pawnee hath still his remedy for the money against the pawner; for the law re- Vide Str. 919. quares nothing extraordinary of the pawnee, but only that he Tall use an ordinary care for the restoring the goods.

If a pawn therefore be lost before tender, the pawnee is not liable, unless there be default in him; but if after Lit. Rep. 2000. tender the pawnee keeps the goods, and they are stolen, Ower. 12 1. the mawnee must answer; for now his property is determirsed, and he is a wrongful detainer; and he that keeps goods by wrong must answer for them at peril, in all evezzes; for his detainer is the reason of the loss. Deliverect per Holt, C. J. in the case of Coggs and Bernard (a). Triss \_ 2 Anne B. R.

(a) Vide the principal point in this ubi supra, and Sir Wm. Jenes's Trea-

1 Salk. 26., the very elaborate tise on Bailments. Per Lord Kenyon, celebrated argument of Lord Hil. 33 G. 3., Cogg: and Bernard, is Chie & Justice Holt, in Ld. Raymond, a case of the very first authority.

# Poor, Poor's Rates, Uagrants,

Vide titles Orders, Seffions.

## 1. Inter The Inhabitants of the Parish of Talborn and Boston.

[Mich. 7 Will. 3. B. R.]

Taxation only without payment makes no fettlement. Vides in the parish forty days without giving notice, it is no fettlement within the new statute unless he pays the tax; for it must be taxing and paying, and not taxing only, Post 514, 536.

Show. 12.
Comb. 282.
Comb. 282.
Set. and Rem.
279. S. C. Vide Skin. 620. Foley 128.

### [524] 2. Inter The Parishes of Ryslip and Harrow.

[Hill. 8 Will. 3. B. R.]

Living in a parish where H. has land, gains a fettlement.

PER Holt, C. J. Having land in a parish will not make a fettlement, but living in a parish (a) where one has land will gain a fettlement without notice; for the act of parliament never meant to banish men from the enjoyment of their own lands, and the law takes notice of freeholders, as those that chuse members of parliament, and are jurors. Also boarding as a scholar gains no fettlement, no more than being nursed in a parish.

Str. 1116.

2 Seff. Ca. 400. Bur. Set. Cas. 307.

(a) R. That the residence need not be on the estate, provided it is within the parish, Bur. S. C. 125.

### 3. The Case of The Parish of Shoreditch.

[Mich. 10 W. 3. B. R.]

Justices may quash the whole rate where the rate is unequal, that by the statute of 43 Eliz., the justices could not quash.

the whole rate, but were to relieve the parties grieved, and make, or Sed per Cur. If a rate be burthensome to a whole set of order to be made, men, as in this case it was to landholders, the best way is Vide ante pag. to quash the whole rate; and the Chief Justice held, that 434, and post if the justices quash this, they may make a new one themCarth. 464 S. C. selves, but they are not bound to do it, but may order the Holt 508, 573, ancient inhabitants to do it (a).

(a) Vide note to the case of the parish of St. Leon, Shoreditch, ante 483.

### 4. Inter The Inhabitants of the Parish of Harrow and Ryslip (b).

[Mich. 10 Will. 3. B. R.]

A Comes into Harrow, and, being likely to become Confirmation chargeable, was removed to Ryslip; Ryslip appealed; upon appeal is and upon the appeal, A. was adjudged to be settled at Ryslip; arishes, otherslip. Afterwards Ryslip discovered that Hendon was the wife of reversal. place of his last legal settlement, and sent him thither; Vide ante place and the question was, Whether, after the adjudication ib. & post pag. upon the appeal, Ryslip was not estopped against all the 517. I Vent. world to say, that Ryslip was not the place of his last legal 310. Vide ante settlement? Et per Holt, C. J. Ryslip is estopped to say 492. 5 Mod. otherwise: for if Ruslip had not been the very place of his and Ruslip had not been the very place of his and Ruslip had not been the very place of his and Ruslip had not been the very place of his and Ruslip had not been the very place of his and Ruslip had not been the very place of his and Ruslip had not here the very place of his and here had not here the very place of his and here had not h otherwise; for if Rylip had not been the very place of his and Rem. 184. last legal settlement, the justices must have sent him back S. C. to Harrow, who were first possessed of him, for that rea-10n, because they were possessed of him, and he did not belong to Ryslip. And now this is in effect the same question again, viz. Whether he belongs to Rylip? which question has been already determined by the justices on the appeal, who have adjudged that he was last settled at Now this point being determined, the appeal must be final and conclusive, otherwise there would be no end of things; and the rather as to Ryslip, 1st, Because Ryslip was party to the fuit wherein this determination was made, and yet H. may be estopped where he is not party to a fuit s per Holt, C. J. who remembered the case of Thornand Pickering, where it was adjudged, that if H. be adjudged by two justices to be the father of a bastard child, he is estopped as to all mankind to say the contrary, and any man may call him fo at his pleasure. The case was, A libel was exhibited in the ecclesiastical court for saying he had a bastard, and the desendant suggested for a prohibition this adjudication by the two justices; and the suggelt ion being turned into a declaration in an attachment on the prohibition, the defendant pleaded to it, that the

(6) 2. If this case should not be intitled Hendon and Ryslip? Vol. II. words

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words were spoken at large, without any relation to the adjudication by the justices. Plaintiff replied, and prayed judgment if he should not be estopped by the adjudication to fay he had not a bastard.

8 Mod. 72. 10 Co. 10'. 6 Mod. 287.

f.nte 4 6.

Afterwards, Hill. 10., this was moved again, and then Holt and Gould held the adjudication was final as to Ryfli, against all persons and places, because the point of his set tlement as to Ryslip was tried in the appeal; but as to Harrow, (for he had been formerly removed by them to Hendon, and that order reversed,) they were at liberty to fend him to any other place, and were not estopped; be cause the justices on the appeal did not adjudge him to b fettled at Harrow, though they adjudged him now to b fettled at Ryslip, to that the other point was not tried Turton and Rokeby contra. Adjournatur.

### 5. Anonymous.

[Hill. 10 Will. 3. B. R.]

overfeers to come to an account ante 484, and 524. Poft, pl. 1 ., and 20. 5 Mad. 179,

A mandamus to A Mandamus was granted to the justices of peace o compel precedent A Film commendation to the pushing of peace of the pea 43 Eliz., commanding them to compel the preceder overseers of the poor of the parish of A. to come to an ac with the present count with the present overseers, and this writ was no quashed. Vide quashed: 1st. For that the account by 42 Eliza is to be quashed: 1st, For that the account by 43 Eliz. is to t given to two justices, and not to the succeeding ove feers (a). 2dly, Two of the persons named in the wri whom the justices were to compel to come to account, d 6 Mod. 77, 97, not appear to have been overfeers.

(a) Vide flat. 17 G. 2. c. 38.

#### Inter The Parishes of Beckenham an Camberwell.

[Trin. 5 Will. 3. B. R.]

Unmarried perfon hired for a year. Sitiand and pl. 13.

A Question was made upon 8 & 9 W. 3. c. 3., which e acts, that an unmarried person, hired for a year Rem. 180. S. C. shall not be settled, unless he serves the whole year, wh [526] ther that extended only to cases that might happen aft Videpon, pl. 11. the act, or to such also as had happened? Et per Cur. I fuch only as may happen after the act: It can have no r trospect, but declares a law for the future, notwithstan ing the words declared and enacted. Adjudged upon a sp cial order.

### Anonymous.

[Hill. 11 Will. 3. B. R.]

F.H., being settled at A., becomes afterwards a vagrant, Vagrant to be some justices have thought that to be a determination of fent to the place of his birth, and the festilement; but I never could think so; for if H. be from thence by found a vagrant within 39 Eliz. c. 24., he may be fent to order to the the place of his birth; but then by 43 Eliz. c. 2. he may place of his fetbe sent from thence as a poor person to the place of his last legal settlement; for his being sent to the place of his birth, satisfies the statute of 39 Eliz., and so both the statutes stand together. Per Holt, C. J.

### S. Dominus Rex versus The Inhabitants of Audly.

[Mich. 12 Will. 3. B. R.]

A N order of fessions made upon an appeal from a poor's A standing rate rate, being removed into this court by certiorari, the but must be vacale was, on Sept. 1, 1665, a certain, rate was agreed to ried by circumby the inhahitants of the parish of Audly, which had been stances. Holt followed ever fince till the last year, when a new rate was 576. S. C. made. Upon appeal to the fessions the new rate was quashed, and the old one ordered to stand. And now it was objected, that it did not appear this was a poor's rate, being called a parish-levy, which might be as well for the church as the poor, and then the justices had no jurisdiction. Darnel, The Court will intend it. Holt, C. J. Twisden used to say, If a particular jurisdiction does not shew the matter to be within its authority, it must be taken to be out of it. Mr. Parker took another exception, viz. that the whole rate could not be quashed at the complaint. of one man; and also that the old rate, however just at first, might be unequal now, and therefore the justices could not make a standing rate; which last fuit concession for Holt, C. J. for lands may be improved. By 43 Eliz. the rate must be equal; ergo it ought to be continually altered, as circumstances alter. The justices could not confirm an old rate, and in this their order is nought. And by him it was faid in this case, that though the justices at selsions need not give a reason for their order, yet if they give a reason which is wrong, we must be guided by it, and Auash the order, because it appears to us to be no reason.

### Inter The Inhabitants of Mynton and Stony Stratford.

[Mich. 13 Will. 3. B. R.]

Reversal on apeal is final only between the partier, but conclutive against ail the world. Vi. ante, p. 486, 1 Vent. 310. Vide ante 4 12, 5 4. 5 Mod. 417. 6 Mod. 259, 2°7. Cafes B. R. 668. S. C. 3 Saik 250. Set. and Rem. 2\_8. Holt 577.

B Y order of the justices a poor person was sent to Mynton: Mynton appealed to the sessions, and the order was discharged; and then by order the person was sent to firmation is con- Stony Stratford, who appealed, and the order was confirmed; and then by another order the person was sent back to Mynton. Et per Curiam, The last order to send &c 1b. & p. 524. him to Mynton was illegal. Per Holt, C. J., If on appeal to the fessions an order be discharged, that judgment binds only between the parties. But when upon an appeal an order is confirmed, that is conclusive to all persons as well as to the parties, for it is an adjudication that this is the place of the party's last legal settlement, which cannot be avoided by the parish against whom it is made. It was also held, that a parish in reputation is liable, if there be officers, i. e. churchwardens.

#### Anonymous. IO.

[Pasch. 1 Ann. B. R.]

Hospital lands are chargeable to the poor. Vide Cowp. 83. Cald. 151. 4 Bur. 2455.

H OSPITAL lands are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon their neighbours. Per Holt, C. J. (a)

II.

(a) R. 2 Bur. 1064. That St. Luke's possessory right or interest; or upon the Hospital for poor lunatics was not rate. objects of the charity; any of which able, as the rate must either be made cases would be absurd. And there beupon the truttees, who were merely ing no person rateable, it was held by nominal; the servants, who were necessary consequence that there could merely hired attendants, and had no be no rate. Vide also 4 Bur. 2439.

Post, pl 13. S. C. Set. and Rem 181. Holt 577.

Inter The Parishes of Farringdon in Berks and Witty in Oxfordshire.

[Pafch. 1 Ann. B. R.]

Unmarried peryear, marrying

A Servant came into the parish of S. was hired for a year, and having served half a year of the time, marb-fore the year is ried a woman in the parish of Witty; and the question expired, cannot was, 1st, Whether the justices, on complaint of the be removed, and performing the churchwardens, could make an order to remove him to the

the place of his last legal settlement? 2dly, Whether his service, gains a serving here would not gain a settlement? To the first same, pl. 6. point it was admitted, that the contract between the mas
3. T. R. 382. ter and servant was not dissolved by the marriage; and Post, Fl. 13. that, admitting it might be diffolved by an order made on 2 Bur. S. C. complaint of the mafter (a), yet, without that, and upon 148. Seff. Ca. complaint of the officers only, it could not be dissolved; 13. therefore Broderick (of counsel) admitted that the justices could not in the principal case so remove him, as that ho could not come to ferve his mafter, but held he might be removed, so as that the order should disturb him, and prevent a fettlement; and this he said was a medium that would neither prejudice the contract, nor evade the statute. He compared it to an order to remove on 14 Car. 2. before forty days stay; in which case the very making of the order obstructed a settlement; and is may be executed after the forty days. Holt, C. J. and Powell contra, That an order to disturb him and not remove him, was not within the meaning of the act; disturbing him, without power to remove, is vain; and this does not unsettle, nor is it like the case of sorty days. 2dly, It was questioned, Whether such a stay, &c. would gain a settlement; because the statute make the party's being unmarried a qualification as well as his stay, viz. If any such person, being unmarried, being hired, &c. such service, &c. So that the words fuch fervice goes to all, not only the stay, but the flate of the party. To this Powell inclined; Holt, C. J. contra, Such is only such service, and the marriage does not hinder the fervice; the contract continues; and suppose the woman he marries be of the same parish, shall not that gain a fettlement?

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(4) R. Bur. S. C. 322. That a justice cannot, on complaint of a master, discharge a fervant for marrying.

### Inter The Inhabitants of the Parishes of Cumner and Milton in the County of Berks.

[Trin. 2 Ann. B. R. S. C. Fortesc. 322.]

I PON a special order of sessions, the case was, H. Father settled at was fettled at Cumner, and had feveral children born A. removes to there: Afterwards he removed to Milton, and gained a dien, and gains settlement there, by renting a tenement of the value of a new settlement 10 l. per annum. He became poor, and his children, un- there, and fo do der the age of seven years, were sent back to Cumner, by the children, though under the order of two justices, which was confirmed at the sessions. age of seven Powell, J. held, that when a child is sent with the parents years. Vide by reason of nurture, it gains no settlement; but here the Comb. 380, 381.

children 3 Salk 251.

S. C. 6 Mod. 87. Holt 578. Set. and Rem. 239, 242.

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children did not come to Milton by order. The children's settlement shall not be divided from the father, for that would be unnatural. When a man gains a fettlement for himself, his wife, and servants, he shall gain a settlement for his children also; but if a widow, having children under the age of seven years, marries a man of another parish, the children shall go with the mo-ther for nurture, but after seven years of age they shall be sent back to the parish where their father was settled, for she cannot gain a settlement for them in this last parish, being under coverture, and having a settlement there herself only as part of her husband's family, from whom she cannot be severed (a). Holt, C. J. Birth is a fetilement, and the first settlement; and there must be another second settlement by forty days, &c., to alter the primary fettlement. A child under the age of seven years is accounted a nurse-child. If a child be put out to nurse, or for education, though it be above seven years old, it gains no fettlement thereby, as it was held in Sir Paul Jenkinson's case. The question here is, Whether the first settlement by birth be altered? It is hard, I confess, to remove the child from the father. Gould, J. The child may be removed after the age of feven years, but not before; he is fent with his father for nurture only. Holt, C. J. Suppose the father and mother come to A., and then go to the parish of B., and within forty days the mother be delivered of a child; the child, though legitimate, shall be settled where it was born. The principal case is fit to be well confidered; the father indeed ought to maintain his children, but the question is, Whether the children, by living with the father, gain a fettlement? The justices cannot remove the children from the father till he fall to decay. Afterwards this was moved again. Et per Holt, C. J. The question is, When the father comes with his children to Milton, and gains a fettlement there, whether that does not also give a new settlement to his children, and unfettle them as to Cumner, the place of their birth? If a father be fettled and die, his wife being big with child, and after that the mother dies before she is delivered, and afterwards the child is born, the child is fettled there by his birth (b). In this case the settlement of the father at Milton, is a fettlement to the children. The child is fettled by birth only, where it is an accidental fettlement (c). The order was quashed (d).

(a) R. acc. Carth. 449. 2 Bott. 3d father was settled before his death.

edit. 34.

(b) Rex v. Clifion, 19 Vin 382. If
the father die before the child is born,
yet the child shall be settled where the
Raym. 1474.

(c) Vide Foley 313.

(d) R. acc. Foley 257. And. 345.

Vide Set. and Rem. 17. Str. 580. Ld.

### 13. Inter The Parishes of Farringdon and Ante, pl. 11. Wilcot.

#### [Pafch. 2 Ann. B. R.]

Being fingle, was hired for a year; after he had Unmuried per-fer ferved three quarters of the year, he married, and year, marrying the justices removed him to his place of last legal fettle- before the year ment. Et per Cur. The contract being good, the justices expired, but perhave no power to remove him from his master before the vice, gains a fetend of the year; for they cannot annul the agreement be- tlement. Vide tween master and servant, unless it be upon complaint of ante, pl. 6, and the master (a). Settled or not settled, was not before the Court. But as to that, viz. whether such person serving out the year would gain a fettlement? Holt and Gould held, the word unmarried went only to the hiring (b). Powell contra, that it went to the whole service, by reason of the word such.

(a) Nor upon such complaint, Bur. (b) R. acc. Foley 148. Seff. Ca. Set. Ca. 322.

#### 14. Inter The Parishes of Little-Kire and [530] Woolfall.

#### [Trin. 2 Ann. B.R.]

A Parishioner of the parish of A. came to B. with a cer- Certificate-man tificate, according to the late act of parliament; and is not removethe justices reciting that matter, and because he was likely chargeable. to become chargeable to B., fent him back to A. Win- Vide infranington moved to quash the order, because he is not removeable till he is actually chargeable by the express words of the act 8 & 9 W. 3. c. 30. Et per totam Curiam the order was quashed, nisi. Mr. Broderick agreed the exception, but said the reason of the removal was, because the certificate was wrong, and that the fessions have authority in this matter; for an appeal lies to them within Vi. 3 T. R. 49. the equity of 14 Car. 2., where a certificate is made and Bur. S. C. 302. figned by two justices. Powell, J. contra, If there was a fault in the certificate, it ought to appear to be the reason why he was fent back, and the justices at sessions have not a jurisdiction by way of appeal upon such a certificate.

### 15. Inter The Inhabitants of Malden and Fletwick.

[Trin. 2 Ann. B. R.]

Order of removal of certificateman muft adjudge him to be actually chargeable, ut fupra.

A N order was made reciting, That whereas complaint has been made unto us by the, &c., that J. S., who is lately come into the parish of, &c. with a certificate according to 8 & 9 W. 3., is actually chargeable to the parish, and quashed; for the justices must adjudge him to be chargeable, or at least must say it appeared to them that he was so; but the justices need not adjudge the place that gives the certificate to be the place of his last legal fettlement.

### Inter The Parishes of All-Saints and St. Giles in Northampton.

[Trin. 1 Ann. B. R.]

Certificate concludes the parish glving it, only to which it is

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UPON an appeal a special order was made, and the case was; One was born at A. and came and lived at against the parish B. some years, but never gained any settlement there; then he removed to C. for convenience of getting his livegiven. Vide post 535. Case of Honiton con. act. The man became chargeable, and was sent back to tra. Holt 578. B., who found that he was last legally settled at A., and S.C. fent him thither. Et per Holt, C. J. The reason of the act of parliament about certificates was only to encourage parishes where poor persons were minded to go, to receive them; and therefore it enacts, that when the poor person shall be chargeable, the parish which gave the certificate shall receive and provide for him as a settled inhabitant, which words lay an obligation upon the parish which gave, him the certificate to receive and provide for him against that parish which they gave the certificate to. But as to all other parishes, they are as they were before (a), for the conclusion is only by reason of the words of the act of parliament, which extend only to the parish to which he was fent; by consequence the conclusion can extend no farther. Powell, J. This way of giving certificates was a thing commonly practifed before this act of parliament, and it was made only to oblige the parish who gave the certificate to receive him again of the other parish to which the certificate was given: But the intent of that was not to make a new fettlement which was not before. But per

> (a) R. acc. 4 T. R. 251. Vide Say. 231. Bur. S. C. 373, 381. Holt.

Holt, C. J. Such certificate is a mighty evidence before the justices; and so is a demand and refusal of a converfion, which yet being specially found, will not be a convertion.

### 17. Tawny's Case.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1009. S.C.]

TAWNY being overfeer of the poor of Little Port in No mandament the isle of Ely, laid out his money in the relief of the lies to the overpoor, and was turned out of his office by the justices, be- rate to reimburse fore the end of the year, by which means he lost the op- former overseers portunity of making a rate to reimburse himself: Upon Vide pag. 484. this he obtained a mandamus directed to the churchwar- 5 Mod. 179. dens and overseers of the poor, to make a rate to reimburse 6 Mod. 97. S. C. him; Mr. Parker and Mr. Eyre argued, that there could 3 Salk. 232. be no fuch charge, neither by common law nor by the Holt 579. Rate statute 43 Eliz. Et per Holt, C. J. We cannot order the must be for the parish or overfeers by a mandamus to make a rate to raise relief of the poor.

Ante pl. 3. money to reimburse an overseer, but only to raise money for the relief of the poor, nor can they make a rate otherwife (a): The act of parliament is expressly so, and must be purfued. An overfeer is not bound to lay out money till he has it; if he does, he must make a new rate for the relief of the poor, and out of that he may retain to pay himself: Tawny should have done so; he trusted where he needed not have done it: he has not pursued the means Le statute gave him, and we cannot relieve him. Et per Lot. Curiam, The mandamus lies not; ideo cassetur. Et nota Per Cur. The churchwardens and overseers may make a te of themselves. Weld and Page pro le mandamus.

(a) R. Doug. 116. on the authority rebuild a workhouse. Vide Foley 10.

this case, That a rate cannot be made 1 Bott. 3d edit. 272. Foley 33. to repay money borrowed to repair or

#### Inter The Parishes of Westbury and 532 Coston.

[Hill. 2 Ann. B. R.]

Woman big with child was removed by order of the Baftard botn at justices from Westbury to Coston, and, pending the A. pending an order of removal of a bastard-child. Coston appealed, and thereupon the wards reverted, or the child was is settled at B. Vide ante 427, C. J. Though here be no fraud, here was a wrongful re528.

moval, and the reversal makes all void ab imitio. Fraud. or not fraud, is not material in this case; but the settlement of the child depends upon the removal, for if that was wrong, they shall not ease themselves by it.

### Tracy versus Talbot.

[Trin. 3 Ann. Coram Holt, C. J. at nisi prius.]

A Mellmenta for the poor ought to be raifed 214. S. C. 3 Salk. 260. Set. and Rem.

H. Took part of a house in the parish of D. on the 3d day of Decemb., and was rated as an inhabitant, monthly. 6 Mod. and was distrained for a quarter's rate the Christmas following; but the distress was taken before Christmas on a general warrant made for the whole year; and in replevin 235. Holt 581. upon evidence it was ruled per Holt, C. J. 1st, That if two several houses are inhabited by several families, who make and have but one common avenue or entrance for both; yet in respect of their original, both houses continue rateable severally, for they were at first several houses; and if one family goes, one house is vacant: But if one tenement be divided by a partition, and inhabited by different families, viz. the owner in one, and a stranger in another, these are several tenements severally rateable, while they are thus feverally inhabited; but if the stranger and his family go away, it becomes one tenement. 2dly, That H. could not be rated for the whole quarter, for poor's rates are to be affeffed monthly by the statute; and by this means a man cannot move in the middle of a quarter, but he must be twice charged (o). 3dly, That H. could not be distrained by virtue of the general warrant made before the rate; but there ought to be a special warrant on purpose. 4thly, That a distress could not be taken for a quarter's rate before the quarter was ended (b); but the jury faid the custom was otherwise.

(a) Vide 6 Mod. 97. 8 Mod. 10. 17 G. 2. c. 38. f. 12. (b) R. contr. 1 Bett. 3d edit. 207. 2 Bur. 1152. 2 Bl. Rep. 694. Stat.

#### [533]Domina Regina versus Hedges. 20.

[Mich. 4 Ann. B. R.]

Upon appeal from allowance of overfeer's accounts, festions must execute their judgment in the fame manner as two juftices orght to

A N order was made at the quarter-fessions upon appeal: The case was, Hedges, an overseer of the poor, accounted before two justices, and this account was allowed; the parish appealed to the quarter-sessions from this allowance, and they disallowed the account, and ordered him to pay so much over, which they adjudged to be in his hands; and for not doing this, they committed him. Mr.

Egre moved to quash this order, because by 43 Eliz. c. 2. do. Vide ante feet. 4. they should have levied the arrears by distress and ib. & 6 Mod. 77, Tale, and in default of distress have committed him: And 97. the whole Court agreed, that the justices at the sessions upon the appeal must execute their judgment in the same manner as the two justices must do, and that the two justices must have sent their process to distrain, and upon a weturn to that, that there was no distress, should have com- VideSt. 17 G. 2. mitted him. Then Darnel moved that it might be only 6.38. 6.2. quashed as to this part; quod fuit concessium per Cur. Then Mr. Eyre objected to that, viz. that the first order, as recited in the order of appeal for the allowance of the account, was not by two justices quorum unus; sed non allocatur; We cannot judge of that upon a recital, so as that you may take advantage of it; you must bring in that order by artiorari.

### Inter The Parishes of St. Bride's and St. Saviour's.

[Hill. 4 Ann. B. R.]

Poor person was sent from St. Bride's in London to St. Apprentice may Saviour's in Southwark, and upon an appeal a special gain assettlement, though the ma order was made: The case was, B. was bound apprentice fter has none. for four years to J. S. and lived out these four years at Ant. 497. pl. 28.

St. Bride's with him; J. S. was only a lodger and had S. C. Set. and no settlement there. And the Court held the apprentice was well fettled in St. Bride's, for he was not a person removeable, nor does his settlement depend on his master. as that of a wife on her husband for a settlement; but he gains a settlement for himself (a) within 14 Car. 2. by forty days inhabitation, and so of a hired servant; but the matter went off upon another exception.

(a) R. acc. Foley 150, 152. Set. and Rem. 65. 2 Bott. 3d edit. 564.

22. Jenkin's Cafe.

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[Pasch. 5 Ann. B. R.]

AN order of sessions was made, that the desendant Order to relieve Thould pay 2s. per week towards the support of his his father till that Court should order the contrary which sessions order the father, till that Court should order the contrary; which contrary, good. was held good, because it was indefinite and no set time limited; and if an estate happened to fall to him, they might apply to the justices; otherwise if a time was limited.

### 23. Domina Regina versus the Inhabitants of Buckingham.

[Pasch. 5 Ann. B. R.]

Nothing makes a fet lement within 3 & 4 W. & M. that is not within the very words. Vide ante 478, 523, 524. post 536. I Show. 12. Comber. 282. 5 Mod. 330, 331, 454. S. C. Holt 582. Set. and Rem. 143.

A Special order was made, wherein the case was; H. being a poor person went to Buckingham, where he took part of a house of W. T. at 31. per annum, and infifted when he took this apartment, that he would pay no taxes for it, but that the leffor should; this was agreed to, his rent being the more and the greater upon that account: This appeared upon evidence, and also that this apartment before the taking, and while he continued in it, was diftinct from the rest of the house without communication, and was taxed as a house of itself, and that the tax was laid upon W. T. the leffor; and that while H. lived there he took his freedom in the corporation, and once voted as a freeman at the election of bailiffs for the corporation. The justices at the quarter-sessions adjudged this to be a good settlement: But upon the motion of serjeant Broderick it was quashed: He insisted that since the explanatory act 3 5 4 W. 5 M. nothing makes a settlement within that statute that not comes within the words; an explanatory act implying a negative of any thing else. Et per Holt, C. J. and Powell, J. Coming into a parish, and being taxed by the parish, made a good settlement without a notice in writing, within the statute Jac. 2. But the law is altered by 3 & 4 W. & M., and as to his voting they could not take notice that that implied a fettlement; for a bare residence might by the constitution of the corporation entitle him to that, and his voting was an act that related to the corporation, and not to the parish.

Foley 210, 123. Str. 835. 2 Bott. 3d ed. 125.

#### [535] Inter the Inhabitants of the Parish of 24. Dunsfold and Ridgwick.

[Mich. 9 Ann. B. R.]

ings for half a

Two several hirings for half a year, and service fervant to live at Ridgwick for half a year, and after for a year, not that was hired again to live there for another half year with tofficient to gain the same person, and thereupon served a year in one con-Black 191. S.C. tinued entire fervice, but by feveral hirings. Sir Peter King urged, that here was a service for a year, and a hiring for a year, though by several contracts; and that the hiring need not be by one entire contract, and that so it had been held; and he cited a case where H. took a tene. ment of 5 % a year, and also another tenement of 5 % a

year, and occupied both, and this was held to be a rentis g of a tenement of 10 L per annum. Et per Cur. It paght to be one entire contract, and one entire service; Electore is required by the statute as well as the other. If Lervice under several contracts shall gain a settlement, one that ferves by the month, by the week, or by the day, may, if he continues a year, gain a settlement; one may have by the day for charity; but there is danger of being chargeable in hiring such a person by the year: For such 2 term as a year it is not supposed a master would hire one, uzzless able of body, and so a person not likely to become chargeable. Also the Chief Justice observed, that by the Latute of Eliz., the retainer of servants was for a year; that 14 Car. 2. requires forty days stay, and that this was inconvenient, for by gaining a settlement in forty days, les vants grew infolent; and that these latter acts, viz. & 4 W. 3. c. 11., 8 & 9 W. 3. c. 30., do but turn the for ay days service into a year's service, and the hiring to be 2 Tetainer for a year (a) according to the statute of Eliz.

(a) R. acc. 1 Str. 83. Foley 137. Cald. 133.

Inter the Inhabitants of the Parish of vide ante 5.0. Honiton and St. Mary-Axc.

[Mich. 9 Ann. B. R.]

Came to Honiton with a certificate from the parish of Certificate con.

A.; after this he went to the parish of B.; and cludes the parish no being fent to the parish of A., the said parish offered giving it, as to all the world. to Prove that he was settled at the parish of St Mary-Axe; Black. 192. S.C. and the question was, Whether A. was bound by the cer- Case L. E. o. tificate as to Honiton only, or concluded as to all parishes St. Giles's in whatsoever? Et per Cur. Besore the statute a certificate Northampton, was only an evidence of a private undertaking between the ante pl. 16. parishes, in the nature of a contract; but now it is a soleman acknowledgment, like the conuzance of a fine; and thereby the party is owned to be legally fettled there, and that they will provide for him; and as all other parishes on This certificate are bound to receive him, so the parish that certifies is concluded as to all other parishes. there is no reason why it should differ from an adjudica- R. contra tion ince this is the acknowledgment of the parish figned 4 T.R. 252. by the proper officers, and made before two justices of peace, who are proper judges, and upon less evidence could have adjudged it a settlement, by which sentence all Parelies would be bound, and there is no remedy but to repeal it.

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### Inter The Parishes of Evelin in Oxfordshire and Rentcomb in Gloucestershire.

[Hill. 10 Ann. B. R.]

Renting a mill of 10 l. per annum gains a fettlement. Vide ante 402, 524. 1 Show. 12. Farefl. 54. 5 Mod. 419.

AN order was drawn up specially to have the opinion of the Court, Whether renting of a water-mill of 10%. per annum would make a settlement? Et per totam Curiam clearly, A mill is a tenement, and the renting thereof must gain a fettlement within the statute (a).

(a) R. fimiliter as to a windmill, Bur. S. C. 107. 2 Str. 1077.

#### Inter The Parishes of Gatton and 27. Milwich.

[Hill. 10 Ann. B. R. S. C. Foley 123.]

Parish clerk nominated by the parfun is in for life, and gains a fettlement. Vide ante 478, 523. 1 Show. 12. Shaw. P. L. and Rem. 158.

AN order was drawn up specially for the opinion of the Court; and the question was, Whether one appointed clerk of the parish by the parson, and executing the office for a year, should gain a legal settlement within 3 & 4 W. & M., of which the words are, viz. shall execute any annual office or charge? For it was objected, that 223. S. C. Set. this was not an annual office. Mr. Lechmere contra: The intent of the act was, that no office under an annual one should gain a settlement, and majus continet in se minus. On the general nomination to the office of parish-clerk he is in for life. Powell, J. His being put in by the parson makes no difference, no more than where the constable is put in by the leet, and not by the parish; it is more than an annual office, he is not removeable, and has fees. Eyre, J. He is but a servant to the person at will: Where he comes in by election, he has an estate for life by the custom, but here is no deed or writing: How can he have an estate for life in this office? Powell, J. At that rate he has not an office at will, for a man cannot have an office at will without deed. The office of churchwarden was by common law, and yet that is for a year without any deed or writing. So it is of a parish-clerk, he is by common law an officer, and is in for life without deed; fo ruled, absente Parker, C. J.

Str. 542.

### Powers.

### Winter versus Lovedore.

Lutw. 1464. 4 Mod. 265. 1 Mod. 318. 6 Co. 33. 8 Co. 70. 4 Co. 70. S. C. 5 Mod. 5 Mod. &c. Vide 6 Mod. 20. Cales B. R. 147. Holt 414.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 267. S. C. Comyns

N ejectment a special verdicte was found, That G. P. Power to demise was feifed of the manor of M., and on the marriage the demession of his son, settled the said manor to the use of himself for lands of the malife, remainder to his wife for life, remainder to his fon nor. Copyholds in tail, with a proviso, that he should have power during exception. Vide his life, and so the wife after him, to demise the premises Ray. 132. Pop. in possession, for one, two, or three lives, or in reversion 9. Yelv. 222. for one, two, or three lives, or thirty years, or for any 2 Lev. 60, 149, number of years determinable on one, two, or three lives, 150. 1 Lev. 150, fo as such demise be not of the demesne lands. G. P. re-241. Carth. citing that J. S. and his wife held a copyhold tenement 1 Inft. 54. for life, demised the said copyhold tenement to the lessee Comb. 371. for thirty years, to begin after the death, furrender, or forseiture of J. S. and his wise; and the question being, Whether this lease of a copyhold was pursuant to, and warranted by the power? it was held in this case by Holt, C. J.

1st, That any lease, to commence in futuro, is in some 1 Lev. 168. sense a lease in reversion, as it is opposed to a lease in 8 Mod. 257. possession; but a lease within such a power must be con- If a man bath a strued of a lease to commence in possession after another power to make lease or interest already created before the reservation of the leases in possession, power, and not after; and that a lease to commence after he cannot do any other leafe, is properly a leafe in reversion; but that both. a lease for life, to commence after another lease in being, is a concurrent lease; because a freehold cannot expect, but must commence in possession presently; however, this may be faid to be a lease in reversion within such powers.

**2dly, That G.P.** might make a leafe in reversion absolutely for thirty years, by virtue of this power, because the limitations and restrictions are disjoined, and the latter part is carried on by way of enlargement of the power; to which

Turton and Eyre agreed, Rokeby diffentiente.

3dly, That this lease was void, because it was of copyhold lands; for by a grant of the demesnes the copyholds will pass; and by the same reason, by excepting the demesnes the copyholds are excepted; and the rather, be[538]

cause the power is derived out of the inheritance, and the tenant at will by his leafes might destroy the copyhold, which is unreasonable; and if there were nothing else for the power to work upon in this case, he may by virtue thereof demise the rents and services.

### 2. Lord Kilmurry contra Geery.

[Pasch. 12 Ann. In Canc.]

of money, imports interest thereof also. Vide Chan. Rep. 18, 23, 281, 251. Hard. 398.

Power to charge IT was held, That if a man has power to charge land lands with a turn I with any furn not exceeding the furn of according with any fum not exceeding the fum of 3000 /. he may charge it with 3000 l. and the interest besides; for the intention is to charge the premises with 3000 l. principal money, and that of course carries interest, and none 363, &c. Eq. would lend such sum on such security, if the law were Ab. 341. p. 4. otherwise (a). S. C. Vi. 1 Lev.

(a) Vide acc. 2 Wms. 591. 2 Atk. 358.

## Prescription.

Star versus Rookesby. Mich. 9 Ann. B. R. Vide title Fences, vol. 1. page 335.

#### [ 539 ] Vide Hob. 302. 3 Leon. 47. 6 Co. 57. 1 Leon. 230. 2 And. 49. Cro. El. 518. 3 Lev. 313. S. C. 4 Mod. 134. 2 Lutw. 10 14 Parliament Cafes 88. Nel. Lutw. 48. Carth 311. Holt 609.

Where the ordinary refules quia infufficiens in literatura, he must shew in what particular. Vice 5 Co. 57,

## Presentation, Admission, Institution. Induction.

1. Hele versus the Bishop of Exeter.

[Mich. 3 W. & M. B. R.]

I N quare impedit the bishop pleaded, That the church became vacant on the 15th day of April, and that the plaintiff presented to him on the 19th day of May following one Hodder; that he examined Hodder, and found him personam minus sufficien. in literatura, ac ea ratione fore perfonam

personam inhabilem & minime idoncam ad habend. beneficium 58. 1 And. 189, cum curd animarum, and therefore refused him on the 20th 193. 3 Leon. day of June, and gave the plaintiff notice; and because Cro. El. 242. no other was presented within six months after the avoid- Hob. 296. ance, he collated the other defendant (the incumbent) 2 Lutw. 10:45 who was instituted. The incumbent pleaded to the same &c. 2 link. effect. The plaintist replied, that Hodder, at the time 622. of his presentation, was vicar of another church; that he was bomo literatus, and in priest's orders; that he Ordinary may was licensed to preach, and had celebrated divine service cxamine and rea many years, and was sufficienter literatus to celebrate the must be in consame. There was a rejoinder and surrejoinder, (which venient time. were laid out of the case,) and thereupon a demurrer. Et per Cur., 1st, The ordinary must examine in convenient time, and after that refuse in convenient time; if he does not, he is a disturber by his delay. 2dly, If the ordinary refuse, quia criminosus, he need not give notice of his refusal, for the crime is as much in the conusance of the patron as of the bishop, and in that case the lapse shall incur from the avoidance; but if he refuse, quia illi- Must give notice teratus, he must give personal notice, and the lapse shall it be quia illiteincur from the refusal. 3 Cro. 119. 1 Lev. 31. Dy. 327. ratus; secus if 2 Ro. 364. 3dly, That the ordinary might well refuse criminosus. Vide Com. 359. him now, as unfit for this cure, though he had been allowed for a former. 4thly, It was not determined what I Burn. E. L. learning was necessary. While the liturgy was in Latin, 142. Cro. Els. that language was undoubtedly necessary; now indeed the liturgy is in English. But it was observed that 13 Eliz. 6.12. requires a clerk should be able to answer his ordinary, and give an account of his faith in Latin, according to the Articles. 5thly, The Court held this pleading too general, because it was not shewn what learning he was defective in; whereas it ought to be certain, because it is traversable; and if the clerk die, to be tried by a jury, and 2 Inst. 632. the king's courts to judge of it; and the law will the rather require a certainty, because this answer is to disable a man in his profession, and prevent him of a freehold. Judgment was given for the plaintiff, which was reversed upon a writ 3 Lev. 374of error in parliament. [Parliament Cases 88 to 104. This judgment reversed in the House of Lords.]

[540]

2. Dominus Rex & Domina Regina versus s.c. 3 Lev. The Bishop of London and Dr. Birch.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 23. S. C.]

Na quare impedit against the bishop of London and Dr. Where a new ad-Birch, for hindering to present to the parish-church of vowson is created St. James's, the declaration set forth, That St. Martin's by statute, it is the Fields being a great parish, an act of parliament tame rules of Vol. II.

382, &c. 4 Mod. 501, 441, 493, 413. Comb. 413. Comb. 301. Holt 585.

law and prerogatives of the crown as an old cne. Ca, Parl. 170.

Vide Vaug. 18. Str. 837. Bl. Rep. 770. 3 Wiif. 221.

2 Wilf. 182.
Before the Reformation the
pope prefented
upon promotion
of the incumbent.

[541] Vide Str. 10:6. Hob. 143. Dyer 233. a. b. in marg.

Hob. 289. 5 Co. 24. 11 Rep. 67.

was made 1 Jac. 2. to take the parish of St. James out of it, and make it a parish of itself with cure of souls, and Dr. Tennison, who was then vicar of St. Martin's, the first rector; and appointing the patronage, after the death of Dr. Tennison, to the bishop of London and his succoffors, and the Lord Jermyn and his heirs alternately: Virtute cujus Dr. Tennison was first rector, and being so, was afterwards made bishop of Lincoln; whereupon it belonged to the king and queen to prefent by prerogative. To this the bishop demurred. and Dr. Birch pleaded the statute of 25 H. 8. and that by virtue of the said act, the archbishop of Canterbury gave Dr. Tennison a dispensation to hold this church in commendam; which the king confirmed, from the 22d day of October till the 1st of July following, &c. To this the attorney-general demurred. Ist, It was objected for the defendant that this prerogative was unreasonable; but the Court answered, that since the king made the church void, it was no hard matter that he should be allowed to fill it; and the patron was not much hurt, for it was only one life exchanged for another; and Sir Giles Eyre held, that if a parson be promoted to be a bishop, the church was void by the commor law; but the reason of it was not from the incompatibility, because originally the bishop was incumbent of the whole diocese, and served the cure by others: and the Court did admit that the Crown did not anciently exercife this prerogative, but the pope did by usurpation; and that notwithstanding the statute of provisors, 25 E. 3. the pope would collate if the incumbent was made a bishop 4 E. 3, 5. Owen 144. Then 7 H. 7. c. 8. was made against provisions; but notwithstanding that the population went on. Vide Cotton 458. Mo. 399. 3 Cro. 5, 6. Owe 144. Win. 94. 2 Cro. 691. Dy. 228., which was but : fudden opinion.

2dly, They held, That the king's turn was not served by the confirming the *commendam*; for the dispensation was only to save the avoidance, and the confirmation con

tinued the possession, but transferred no right.

adly, This being a new patronage created by all oparliament, not in the before, which appoints a particula person to have the first turn after the next avoidance; i was objected, that nobody could say the king should present, when the act said otherwise; and this was therefor a case exempt from the prerogative: But the Court hele that the act did not interfere with the prerogative. If a estate-tail is created by act of parliament, it is subject to such bars as other lands intailed are. The wise shall be endowed of a new estate. Vide 8 Co. the Prince's Case a pari ratione a new rectory shall be subject to the king prerogative.

4

4th!

4thly, It was objected, That this new church, as to Dr. Tennison, was a kind of donative, he coming in without institution and induction, and that the presentable parlonage does not commence till after him, by the words of the statute; and that in case of a donative, the promotion of the incumbent does not make a cellion.

Sed Curia contra: For in point of estate, the right of presentation commences by the passing of the act immediately; but in point of interest, not till the avoidance. Vide 3 Cro. 323. 10 Co. 107. 4 Mod. 190. Show. 164.

3 Lev. 352. S. C.

### Ladd versus Widdows.

[Mich. 1 Ann. B. R.]

PON a motion by ferjeant Selby for a new trial in Presentation may a quare impedit, wherein the point in issue was, When the principle but not ther the church was donative or presentative? evidence a donative. Holt was pretended of several presentations; and the Court, 259. S. C. wiz. Holt, C. J. and Powell, J. held, That though a prelentation might destroy an impropriation, yet it could not 2 Cro. 63. Co.
destroy a donative, because the creation thereof was by 1864-19. letters patent, whereby land is settled to the parson and 2 Rol. 342. 1. 50his successors, and he to come in by donation.

## Principal and Accessary.

[ 542 ] Vide I Lev. 204. Hale's P. C. 215 to 225. Hawk. P. C. 310, 311,

### Domina Regina versus Nash.

[Mich. 1 Ann. B.R. 2 Ld. Raym. 989. S. C. not S. P.]

UPON a conviction of deer-stealing by justices of Who is an sider peace, on the late statute, the question was, Whe- and affister in deer-stealing ther one not present, but procuring, advising, and abet- within a & 4 ting, by lending his gun, dog, &c. before the fact, should W. & M. c. 12. be faid to be aiding and abetting therein? Holt, C. J. inclined, 1st, That he was not within the words, not being Vide C10. Car. actually present at the fact, because the statute is to be 340. construed strictly, for that it takes away the privilege of a better trial, viz. per pares. 2dly, Because it adds a farther Penalty to what was an offence before. He faid there

might be an aiding and abetting before the fact, viz. by advice, &c., or in the fact, by being present; or after the fact, by abetting the party. Vide Dy. 187. Co. Ent. 56. The other judges held aiders in the fact would be principals, and then aiders and abettors would mean nothing. Quod Holt negavit, saying, All that are present may be faid to be principals as to an action of trespass, but not as to the penalty of this statute: And this diversity is apparent in other cases, for one aiding and assisting upon the statute of stabbing shall have his clergy, whereas a principal shall not; so in the case where two went to break a 53. 1 And. 1 6. house, one broke it and entered, the other stood upon the ladder and received the goods; he that stood upon the ladder shall have his clergy, and the other shall not, being a principal (a).

Vide Kely. 52,

placed here by mistake; for at the end of the report of the next case, 2. and Whiller, in Ld. Raymond, there is a reference made by Holt, Ch. J., to a

(a) Quare, if the last point is not case in Cro. Car. 473. having the circumstances above supposed in an indictment on the flat. 39 El. c. 15., against shoplisting.

### Domina Regina versus Whistler.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 842. S. C.]

felony, accetfaries (properly) are not named: otherwife where cular fact more penal. Fac. 129. 543

where flatute makes an offence report and others were convicted of deer-stealing upon 3 & 4 W. & M. c. 10., and that Whistler was illicite & injufte auxilians & affiftens prefat. Rolfe, &c. in ilwithinit, though licita & injusta venatione & occisione dame pred., viz. persuadendo & incitando præfat. Rolfe to kill the same deer, and it mikes a particular lending dogs to hunt and kill, and horses to carry away the faid deer, contra formam flatuti; and whether this was an penal. Fac. 129. aiding and attifting within the statute, was the question. - 25. Holt 215. Powel, Powys, and Gould, Justices, held that it was; but -Holt, C. J. contra, held, that the conviction ought to be quashed; for that where a statute makes that felony, which was not so at common law, aiders and abettors, according to the notion of the common law, are within the statute, though not expressed; but where an offence at common law is only made more penal, aiders and abettors are not to be understood of such as aid before and after the fact, but fuch as are present only: These were only accessaries at common law, and are not within the act. Vide 1 Cro. 474. Dal. 11, 22. Postea, in the same case, Holt, C. J. faid, he held the same diversity, with this farther, that this is to be understood when an offence at common law is made more penal by a particular description of the fact, and not under a general denomination of the crime; as if this Ratute had enacted these penalties on them as trespaffers,

3 Cro. 750. 12 Co. 86.

Vide & Salk. 181, 182.

passers, as it is done by the statute de malefuctoribus in parcis. Vide 1 And. 116. Hale 51, 216.

## privilege of Persons.

Vide 3 Lev. 243, 393. Lutw. 166, 197, 641, and 1466. 1 Sid. 317. 2 Sid. 164. 1 Vent.

### Kirkham versus Wheely.

[Trin. 7 Will. 3. B.R. 1 Ld. Raym. 27. S. C.]

TO an action qui tam, the defendant pleaded that he Pleas to the juwas an attorney of the court of Common Pleas, and negative is well that attornies de C. B. were not suable elsewhere. To this enough. Anne the plaintiff demurred, 1st, Because the plea is only in the 30. S. C. Comb. negative, and no jurisdiction is given to any other court. Cas. B. R. 74. 2dly, Because there is no defence by venit, but dicit only. Defence by venit Per Cur. As to the plea being in the negative, it is well & dicit, or dicit enough; for the privilege is not traversable and triable per plea to the jurif-pair, but a matter of law of which we take notice; and diction. Vide went & dicit, or dicit only, is a sufficient desence in this prox. casumcale. 14 H. 6. 14, 19.

### Stephens versus Arthur.

[544]

[Eodem Termino.]

THE defendant pleaded to the jurisdiction thus, viz. Desence. 3 Lev. Et idem Arthurus in propria persona sua dicit, that he is 182. 1 Lutw. a clerk to a prothonotary of the Common Pleas; and it was 7, &c. 2 Lutw. Objected, that he did not say venit & dicit. Et per Cur. 46. Venit is no part of the plea, but dicit begins the plea; dicit alone shews him to be in court, and here it appears he is in cuftsdia.

### Lane versus Saltmarsh,

[Hill. 8 Will. 3. B. R.]

AN attorney de C. B. being fued by bill in B. R., Bux- r Wilson 306. ton moved he might be discharged. Denied per Cur.; S.P. Andrews 45. Str. 364. Ld. Raym. 1567. 281. Rep. 1035. for let him plead his privilege.

### Brown's Cale.

[Hill. 9 Will. 3. B. R.]

Phil'zers, &c. 3 Lev. 343. 2 Lev. 129. 1 Lutw. 44, 642, 1466. 1 Wilf. 306.

A Philizer de B. R. was arrested per breve, but discharged on common bail; for he ought to be sued by bill, as presens in Curia. Per Cur., absente Holt, C. J. (a)

(a) The officers of the Common there by original writ, Baker v. Swin-Pleas have not the privilege of being don, Ld. Raym. 399. 3 Salk. 283. fued there by bill, as attornies have; 1 Barnes 280. 2 Gromp. Pr. 135. but have the privilege of being fued

### Branthwait versus Blackerby & al.

[Hill. 9 Will. 3. B. R.]

an attorney with another man, 298.

For a joint cause IF a man hath a joint cause of action against two, one of action against I an attended to the state of action against two, one an attorney, and the other not, he must arrest both, and declare against them as in custody. A bill cannot be filed against a person privileged in vacation (b), for then he arrefted. Vide is not present in court; and as to the vacation, it begins 1 Saund 68, 69. the last day of the term, as soon as the court rises. (Vide S. C. 1 Vent. 2 Lcv. 129. 1 Vent. 298.)

Note; The bill must be filed, though the attorney agrees to appear and dispense with it; but it may in such case be filed afterwards. Pasch. 9 Will. 3. B. R.

cafe.

(b) In Waghorne v. Fields, 5 T. R. the vacation. Vide Comerford v. Price, 174. it was decided that a bill may in all cases be filed against an attorney in 2. 84.

#### б. Anonymous.

[Hill. 2 Ann. B. R]

H. Came to confess an indiament, and the Court held, that he had no privilege, eundo & redeundo, because Privilege eundo & redeundo. Vide Raym. 100. 3 Lev. 343. there was no process against him (c). Andrews 275.

(c) In Meekins v. Smith, H. Bl. 636. the Court of Common Pleas laid down this general rule, viz. that all persons who have relation to a fuit which calls for their attendance, whether they are bona fide.

compelled to attend by process or not, (in which number bail are included.) are entitled to privilege from arrest eundo et redeundo, provided they come

### Dillon versus Harper.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 898. S.C.]

S. C. 1 Salk. 328. Farefl.

AN attorney de C. B. being fued in B. R., pleaded his Where privilege privilege; to which it was demurred specially, for of an attorney is not concluding his plea with a profert of a writ of privi- writ, his being lege, testifying his being an attorney, &c. Et per Holt, an attorney can-C. J. The difference is, if privilege of an attorney be not be denied; otherwife if pleaded with a writ, the defendant cannot be denied to be without. an attorney; if without, he may, and then a certiorari shall be awarded to certify whether he be an attorney, or Skin. 5°2. not.

### Scawen versus Garret.

[Trin. 4 Anu. B. R. 2 Ld. Raym. 1172. S. C.]

T O an action in B. R. the defendant pleaded, that Plea of privilege he was an attorney at the Common Pleas. On of an attorney of C. B. need not demurrer Mr. Ward objected, that he ought to pro- flew the writ duce his writ, and conclude with a prout patet per recor- under feal, nor a dum; and also that he laid no venue, alleging no place the C. B. sits. where he was attorney, nor where the court of Common Vide I Saund. Pleas fits. Et per Cur., viz. Holt, C. J., to which the rest 67. Farest 97. affented, An attorney may plead privilege with a profert of 6 Mod. 114. his writ, if he will; or with an exemplification of the re- 1 Salk. 6. Holt cord of his admiffion; or he may plead it as he does here, 587. S. C. Lilly and it is well enough, for so are the precedents, and the Ent. 3. and it is well enough, for so are the precedents, and the plaintiff may reply nul tiel record. Vide 1 Brown. 2 Thom. 4. Cliff. 570. Brevia judicialia 169, 172., cited per Broderick. Thirdly, There was no need of a venue to try where he was attorney, for it being a matter concerning his person, was triable where the writ is brought: So in trespass, if the defendant pleads fon villain regardant, and the plaintiff replies frank-home, it must be tried where the writ is brought. As to the 3d, he wondered how that ever came to be allowed; for that this Court sends writs to the Chief Justice of the Common Pleas by that name: And unless where this is held to be part of the description of a record, it can never be necessary (a).

Privilege of Jurors, Raym. 113, 144. 1 Lev. 159. Privilege of the King's Servants, &c. Raym. 152, 180. I Lev. 233, 265.

(a) An attorney has privilege of longs, Joliffe v. Langston. 1 Ld. Raym. fining a member of the university in 342. Where an attorney of one Court the Court to which the attorney be- sues an attorney of another by attachment, the Court first possessed of the cause shall be preferred, Danser v. Berryman, 2 Bl. 1325.; but fuing by original is a waiver of privilege, Hetberington v. Lowth, 2 Str. 837. Where both plaintiff and defendant are attornies of the same Court, the suit must be by bill, and not attachment, Ratcliffe v. Besley, 2 Str. 1141. If both parties are attornies of B. R privilege will be allowed, secus if the plaintiff belongs to C. B. and defendant to B. R., Shorter v. Packburft, 1 Bl. 19. An attorney has no privilege against the Court of Conscience in London,

Silk v. Rennett, 3 Bur. 1583. fecus 28 to the County Court of Middlesex, Wiltsbire v. Lloyd, Dong. 380. An attorney of B. R. being fued as an attorney of C. B, and lying by was held to waive his privilege, Hern v. Howard, 1 Bl. 231. A ca. fa. for costs, returnable on a general return, held good against an attorney who had sued by attachment of privilege, and was nonfuited. Perrott v. Hele, 3 Wilf. 58. Plea of privilege as an attorney ought to conclude to the record, Foster v. Cele, 1 Str. 114.

### [546]

## Privilege of Place.

Privilege of the Exchequer. 550. pl. 12. 7 Lutw. 46. 2 Wilson 228. Andrews 45.

Supersedeas to a fuit in the Exchequer, dumnos.

DER Walter, Chief Baron. The causes of privilege in the Exchequer are, 1st, If one be informer for the 6 Mod. 305.
Ante 511. Post king. 2dly, If one be accountant to the king. one be debtor to the king. 4thly, Where one is an officer of the court, or attends an officer of the court. Always where the plaintiff is privileged, the fuit is by quo minus; where the defendant is privileged, the fuit is by bill. 31 H. 6. 10. 22 H. 6. 19. b.

A writ was delivered to the barons of the Exchequer in open court, commanding them to stay a suit between mode non tangit Wilson and Rockes, by dummode non tangit nos vel, &c., and the writ was difallowed, for that the defendant might have pleaded that matter to the jurisdiction of the Court. It was admitted, that there is fuch a writ in the Register, but there are several writs there which no usage or precedent does warrant, of which this is one. Et per Walter, Chief Baron, Where one entitled to the privilege of this court is sued in C. B., this Court sends a supersedeas; but if it he in B. R. they do not fend a fupersedeas, for that would be to supersede the king; but the practice is, to fend up the writ-book by the puisse baron, and demand privilege. Trin. 3 Car. In Scac.

> Privilege of the King's Palace, &c. Vide 6 Mod. 73 to 76. 1 Mod. 76. 1 Sid. 211. 1 Lev. 106. 1 Vent. 169. 2 Mod. 181. 3 Inst. 141. Prvn's 4 Inst. 18, 19. Philipp's Regale Necessarium, chap. 1 & 3. 1 Hawk. cap. 21.

## Prohibition and Consultation,

### Shotter versus Friend.

[Hill. 1 W. & M. B. R. Rot. 30]

AN executor being sued for a legacy in the Spiritual Prohibition to a Court, pleaded payment, and offered to prove it by fuit for a legacy, for refusing one witness, which the judge refused, and gave sentence proof of payment against him. Upon this matter suggested, a prohibition by one witness. was moved for. Et per Cur. 1st, Where the Ecclesias-Latch. 117. Moor case 568. Other-tical Court proceed in a matter merely spiritual, if they wise in probate proceed in their own manner, though that is different of wills. 1 Lev. from the common law, no prohibition lies; as in probate 164, 180. of wills; there, if they refuse one witness, no prohibition Temporal inci-Noy 12. 2 Ro. 300. 2dly, Where they have conu-dent must be fance of the original matter, and an incident happens tried according to rule of the which is of temporal conusance, or triable by the common common law. law, they shall try the incident, but must try it as the Vide post pl. 12. common law would: Thus in a fuit for tithes or for a le- 3 Mode and agacy, if the defendant pleads a release or payment, or in a 239. Vide fuit to prove a will, if the defendant pleads a revocation. Cowp. 424. 1 Ro. Rep. 12. 2 Ro. Rep. 42. Yelv. 92. So in the case 655. 1 Vent, at bar, they shall try the matter of payment or no pay- 291. ment, but then they must admit such proof as the common law would, or otherwise they reject the cause themfelves, and ought to be prohibited. 3dly, A bare fuggestion, that the defendant has but one witness, and that they take exceptions to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness, or not, they shall judge, and the party has no remedy but by appeal. Vide Doug. 376. 4thly, That it is not too late to come for a prohibition (363.) 2 T.R. after sentence; for the sentence in this case is the grievance. Confultation denied.

Hob. 300, 30x. 3 Bulft 51. S. C. 1 Show. 158, 172. Vide Raym. 123,189. 191,219. C Carth. 142. 3 Mod. 283. Comb. 160. Holt 612.

### Inter Starky and The Churchwardens of Watlington in Suffex.

[Trin. 4 W. & M. B. R.]

SUIT in the Spiritual Court for taking away two bells Prohibition to out of the steeple, and a prohibition was granted; spiritual Court for the churchwarden is a corporation, and the property for taking bells. in him, and he may bring trover at common law.

12, 25, and 70,

424, 131. 1 Salk. 34, 35. 4 T. R. 351. 2 Inft. 492. Rol. 57.

### Wharton versus Pits.

[Trin. 4 & 5 W. & M.]

Prohibition to the Admiralty denied, unleis the defendant would appear and give bail. 1 Vent. 146, 343. Ray. 3. Mod. 244. Post 553.

A Suit was in the Admiralty against the master and ship which lay in the Thames, for heedlessly running over another ship, and the defendant there moved for a prohibition. The plaintiff informed the Court, that the defendant would not appear, fo that he could have no remedy at law; upon which the Court refused a prohibition, unless the defendant would appear and give bail (a).

(a) R. cont. 3 T. R. 316. Lord Kenyon there said, that as the reasons of the judgment in this case, as here reported, were not disclosed, and as the case itself was not mentioned in

any other book, the Court were of opinion that it was not a fufficient authority to warrant them in imposing the terms prayed for. N. B. Those terms were the same as the above.

### Harris versus Hicks.

[Hill. 4 & 5 W. & M. B. R.]

Prohibition quoad annulling marriage and vers. Harris. S. C. 4 Mod. 132. Comb. 200. Cases B. R. 35. Stiles 10. 2 Jon. 213. 2 Vcz. 245.

PROHIBITION was moved for to the Ecclesiastical Court of Coventry, where a fuit was against the plainbaftarding iffue. tiff for incest, in marrying his first wife's fister, suggesting 1 Saik. 120 to that the faid fecond wife was dead, and by his faid wife 121. 3 Lev. 410. he had a fon, to whom an estate was descended as heir to Lutw. 1059, he had a form to whom an effect was defected as her to 182. Carth. 271. this matter, they went on to annul the marriage and baftardize the islue. Et per Cur. A prohibition shall go as to annulling the marriage or baftardizing the iffue, but they may proceed to punish the incest.

Lutw. 1037, 1043, 1053. Hawkin's Cafe.

[Hill. S Will. 3. B. R.]

Pr. hibition to a fuit for calling 11. knave. Vide Far. 31. Poft. baz, 693. 2 1 cv. 49, 63, 66. 3 Lev. 17, 119, 137, 350. Gedb. 447. 2 Rel. 297.

H. Libelled in the Spiritual Court for calling him a knave, a knave, and a knave indeed; and a prohibition was granted, because nothing was said that could make him liable to ecclesiastical censure. The statute de circumpelle agatis mentions only fuch defamations as are punishable in the Spiritual Court; and for fuch as the Spiritual Court cannot punish, the party shall not be liable there: The reason why the laying violent hands upon a clergyman was there fuable, was, because the clerk having habitum

babitum & tonsuram, which made him known, it was an affront to the whole order.

### Gardner versus Booth.

[Trin. 10 Will. 3. B. R.]

TATHERE it doth appear in the libel, or by the pro- Probibition may ceedings in the cause, that the conusance of the be granted after cause does not belong to the Spiritual Court, a prohibition cause is not of may be moved for and granted after fentence; and this spiritual conuholds in all cases but where one is sued out of his diocese; since; otherwise for citing for there, if he doth not take advantage of it before fen-out of the diotence, he shall not have a prohibition after sentence; ra- cese. Vide Fatio eff, because the cause doth belong to the Spiritual s. C. Cases Court; and though it doth not belong to that Spiritual B. R. 196. An-Court, it belongs to some other, and not to the king's drews 11.2 lnft. Temporal Court.

\* [ 549 ] 602. 2 Bur. 813. Cowp. 424. For prohibitions

after sentence, vide Farest. 137, 148. Winch. 8. 1 Show. 158, 172. 6 Mod. 252. 1 Sid. 65, 632. N. B. 2 Lev. 230. Doug. 377.

7. Bishop of St. David's Case. Pasch 11 Will. 3. B. R. Vide this Case, title Bishops, Archbiskops, &c. Part 1. page 134.

### Godfrey versus Llewellin.

[Trin. 11 Will. 3. B. R.]

TATHERE the matter suggested for a prohibition ap- Where matter of pears upon the face of the libel, we never infift the suggestion upon an affidavit; but unless it appear upon the face of does not appear the libel, or if you move for a prohibition as to more than is necessary. appears on the face of the libel to be out of their jurisdic- Hob. 79. Antion, you ought to have assidavit of the truth of your sug- Ante 461. gestion. Per Holt, C. J. & possea Trin. 12 Will. 3. B. R. 1 Lev. 253.
S. C. Holt. 593. Vide 2 Co. 45. Vide 4 Bur. 2040. Carth. 463.

### Machin versus Maultin.

[Mich. 11 Will. 3. B. R. 1 Ld. Raym. 452, 534. S. C.]

N a declaration in attachment fur probibition, the case H. subtracts was, that the plaintiff lived in Nottingham within the tithes in one dioprovince of York, and there subtracted tithes, and then moves into aubeing found in the first, is there cited and fued, and a confultation awarded. Subtraction of tithes local. Raym. 95. Lutw. 1643, 1057, 1062, 1071. S. C. Mod. 450. N. Lutw. 335. Carth. 276. 3 Salk. 90. Cafes B. R. 252. Vide Fitzg. 110.

other, afterwards removed into Lincoln/bire within the province of Canterbury: Afterwards he happened to go to York, and was fued there in the Court of the Archbishop, for the subtraction aforesaid, and had a prohibition on 32 H. 8. c. 9. for citing him out of his diocese. But at last, after debate, a consultation was awarded; for that the subtraction of tithes is local, and must be sued before the ordinary of that place where the wrong was done; otherwise in cases transitory, ubi forum sequitur reum. And as it was argued by the counsel, this is not citing out of his diocese within the statute, because the diocese where he lives has not a jurisdiction; and if he might not be cited in this case, the thing would be remediless and dispunishable. Vide Godb. 191. 1 Ro. Rep. 328. 1 Cro. 97. 13 Co. 4. Winch. Entr. 570. 2 Ro. Rep. 448. 3 Mod. 211. 2 Brosun. 12, 28.

[550]

Jones versus Stone.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 578. S. C.]

Suit in the Ecelefiastical Court against the vicar of S. for not performing divine fervice in the chapel of C., as bound by cuftom, prohibition denied. S. C. Holt 196. Puft. pl. 13.

AVID Jones, the vicar of N., was libelled against in the Spiritual Court, for that by custom time out of mind the vicars of S. had by themselves, or others, said and performed divine service in the chapel of Chambury, for which there was fuch a recompence; and that he neglected. The defendant came for a prohibition, and without traverling this custom, suggested that all customs were triable at common law: And Mr. Harcourt urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty for which he was not liable of common right. Et per Holt, C. J. A parson may be bound to an ecclefiastical duty by custom, and when he is bound by custom, the Spiritual Court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the Spiritual Court, and begin by an ecclefiaftical act: And a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclefiastical right, an ecclefiastical person, and an ecclesiastical duty, and the prescription not denied (s); notwithstanding 2 Inst. 491. I never could get a prohibition to flay a fuit in the Spiritual Court against a parson for a pension by prescription. Vide 1 Vent. 3, 120, 265.

Tareff. 88. 6 Mod. 230. F. N. B. 51 b.

(a) R. acc. Dutens v. Rahson, H. Bl. 100.

### 11. Sir Basil Firebrass's Case.

Was chief ranger of Enfield Chase, and now a bill Prohibition was exhibited against him in the Chancery of the dutchy for a discovery of what deer he had killed, and what timber, wood, &c. he had felled and cut down, and by the ters to make the defendant forseit his freehold. And to this still a prohibition was 4 Leon. Cas. granted niss; for he shall not be obliged to answer upon his oath, what is to make him forseit his place, but it 2211, ought to be proved against him (a).

(a) A defendant may be protected from making a discovery which may subject him to any penalty or forfeiture, or any thing in the nature of a forfeiture, by demurrer, if the matter is apparent on the bill; or by plea, if it arises from extrinsic circumstances: As when, on an infurance of goods to a foreign port, the bill prays discovery whether the goods did not confift of wool, which it is penal to export to such port, Dimcalf v. Blake, 1 Atk. 52. So, whether goods were taken from the Indians by fraud, violence, or contrivance, E. I. Comp. v. Campbell, 1 Vez. 246.; or whether a bond was usurious, Earl of Suffolk v. Green, 1 Atk. 450.; or whether the defendant, at the time of her intermarriage with A., was married to another person, 3 Bro. P. C. 65. So where a purchase of land is charged to be made from a person out of possession, which is contrary to stat. 32 Hen. 8. Sharp v. Carter, 3 Wms. 374. Whether the defendant procured fubornation of perjury, Baker v. Pritchard, 2 Atk. 387. Whether a purchase was made from a Papist, Smith v. Read, 1 Atk. 526. Harrison v. Soutbecte, 1 Atk. 528. 2 Vez. 389. Whether the party is an alien, on an information by the attorney-general, for lands in his poffession, Attorney general v. Duplessis, cited 2 Vez. 494. Vide Parker 144. Whether 2 person holds an office in trust for the defendant, which would vacate the defendant's feat in parliament, Honeywood v. Selwin, 3 Atk. 276. Whether the defendant was married to A,, and B. was her legitimate son by him, when she pleads that she had

been previously married to C., A.'s brother, in which case her marriage with A. would subject her to ecclesiastical punishment, Brownsword v. Edwards, 2 Vez. 243. Whether the defendant, after being instituted to A., has been instituted to two other livings; which would cause an avoidance of A. Boteler v. Allington, 3 Atk. 453. Whether the defendant had married, fo to incur the forfeiture of an estate or legacy, Monins v. Monins, 2 Cb. Rep. 86. Wrottesley v. Bendish, 3 P. Wms. 235. Chauncey v. Tabourden, 2 Atk. 392. Chauncey v. Fenboulet, 2 Vez. 265. Or whether a tenant has assigned a lease, wherein there is a proviso that it shall be void on assignment, Fane v. Altee, 1 Eq. Ca. Ab. 77.

A defendant was compelled to anfwer a bill to discover a conspiracy or attempt to fet up a child she pre-tended to have by a person who kept and was defirous to have a child by her, Cheboynd v. Lindon, 2 Vez. 450. To discover whether he was tenant for life, though he pleaded that he had made a lease for the life of another, which would be a forfeiture, Weaver v. Earl of Meath, 2 Vez. 108. To discover whether he has a legitimate son, as it does not tend to discover whether he cohabited with any woman, Finch v. Finch, 2 Vez. 491. To discover a second marriage, upon which an estate was limited over from the defendant, such limitation not being confidered as a forfeiture, Lucas v. Evans, 3 Ask. 260.

Defendants are bound by covenants not to plead or demur to any disco-

very, on account of its subjecting them to penalties or forfeitures, E. I. Comp. v. Athyns, Com. 346. 1 Str. 168. Niof. 74. South Sea Comp. v. Bumfted, 1 Eq. Ca. Ab. 76.

If the forfeiture is waived by all

who are interested therein, the discovery must be made, Mitford 158. Vide Mitf. 157, 224. 1 Vern. 109, 129, 306. Parker 144. 1 Harr. Cb. Pr. 7th edit. 378. Bunb. 192. Hard. 138. Com. Ch. 3. B. 2.

### Earle versus Paine.

[Mich. 12 Will. 3. B. R.]

Trespass in B.R. for taking wines flaid by order of Exchequer, an information of feizure depending there. Exchequer privilege. Vide ante 546. 

PAINE, a custom-house officer, exhibited an information of feizure of a hogshead of wine belonging to Mr. Earle, and seized for not paying custom. Earle neglected to come in and enter his claim in the Exchequer, but in the mean time brought trespass in B. R. against Paine. Upon motion the barons ordered the proceedings in the King's Bench should be stayed, \* and the cause there removed into the Exchequer in the same state and forwarduels: Earle was served with the order, but notwithstanding gave rules for pleading; whereupon an attachment was issued by the Exchequer against him; whereupon he moved here for a prohibition to the Court of Vide Hard. 193. Exchequer. And a rule was made to hear counsel; on the argument several precedents were cited, one in 19 H. 7. Rot. 16. exactly like this. The Court took time to confider of the precedents, and in the mean time the matter was compounded. Vide Reg. 187. 2 Inft. 551.

Bunb. 34, 366, 309. Parker 143.

### 13. Anonymous.

[Hill. 12 Will. 3. B. R.]

Prohibition hall not go for a modus or other foreign matter, uniefs it be pleaded below. Poft. 656, 657.

Rep. B. R. Temp. Hard.

I N the bishop of Winchester's case, 2 Co. 45. it is held, that in a fuit for tithes in the Spiritual Court, H. may have a prohibition, fuggesting a prescription or modus, before or without pleading. But this feems not to be law. for 12 W. 3. B. R. a prohibition was moved for, suggesting a custom, &c. Et per Holt, C. J. and the Court, it was denied, unless they pleaded it below, because perhaps they might admit the plea. Also 10 W. 3. B. R. it was Vi. 4 Bur. 2040. said by Holt, C. J. That if a modus be pleaded in the Spiritual Court and admitted, no prohibition shall go; but 357. Bunb. 17. if the question be, whether a modus or no modus, a prohibition shall go, and so is the law win wherever the bition shall go, and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below, before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel.

### 14. Jacob versus Dallow.

[Pasch. 1 Ann. B.R. 2 Ld. Raym. 755. S. C.]

S. C. Farefl. 8. 6 Mod. 230. 5 Mod. 136. Cafes B. R. 233.

THE plaintiff declared in a prohibition, fetting forth H. having a pre-2 prescriptive right in the plaintiff and those whose aceatin achurch. Cflate he had, &c. to a feat in the church, and that the and being difdefendant furmiling a usage time out of mind, had libelled turbed, may sue against him in the Spiritual Court, for disturbing him in in the Spiritual Court to have fitting there, and shews that he had denied the usage in his possession the Spiritual Court, and the judge had refused to allow quieted. Vide his plea. The defendant traversed the plaintiff's prescrip- 5 Mod. 69, 70, tion, and pleaded his own usage; upon which there was 71. 1 Keb. 457. a demurrer. Mr. Eyre urged, that though the plaintiff had by his demurrer confessed his prescription to be false, and by consequence that he had no right to the seat; yet the defendant grounding his libel below upon a cultom which is not triable there, he could not have a consultation. Vide Hetl. 94. Noy 78. 2 Jo. 3. Holt, C. J. held, Vide 1 Eur. 314. That if the plaintiff had not a title by prescription, he ought not to disturb the possession of the defendant; and the ordinary hath conusance of fuch disturbance, and armay fettle it according to usage and possession, unless there be a temporal prescriptive title hurt by their sentence; and the defendant might well fue in the Ecclesiastical Court to have his possession quieted, and might admit Dis prescription to be tried there, as a desendant does a modus or a pension by prescription.

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### Galizard versus Rigault,

[Mich. 1 Ann. B. R. 2 Ld. Raym. 809. S. C.

S. C. Farell 79, 79, &c. Holt 597, 50.

INDICTMENT was for affaulting, beating, wound- Prohibition to a ing, and endeavouring to ravish the wife of B., upon suit against H. which the party was convicted, and afterwards the huf- of chaftity; band brought an action of trespass for the same cause; H. having and now the party being also libelled against in the Spi- been convicted Titual Court for the same fact, viz. for soliciting her chaf- on indictinent for affault with tity, moved for a prohibition to the proceedings in the intent to ravia. Spiritual Court; and it was urged for the jurisdiction of 2 L.v. 63. the Spiritual Court, that they may punish for the folicitation and incontinence, and that this suit was pro falute anime, the other for fine and damages. Sed per Cur., A prohibition was granted; for it being an attempt and folicitation to incontinence, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime in toto; as if one fay, Thou art a subore

Palm. 379. Poft. 692, 693. I Cro. 286. I Mod. 31. I Keb. 589. I Vent. 53. Cro. Car. 393. I Sid. 438. and a thief, or Thou keepest a bawdy-house, which are tem poral matters, the party shall not proceed in the Spiritua Court; whereas, if it were only, Thou art a whore, i libel lies in the Spiritual Court. So if it be said of woman that she is a bawd only, and not that she keeps bawdy-house (a). But per Holt, C: J. If one comming adultery, and the husband bring assault and battery, this shall not hinder the Spiritual Court, for it is a criminal proceeding there, and no indictment lies at common law for adultery (b). 1 Roll. Abr. 295. 2 Inst. 488.

(a) R. acc. Str. 1100.

(b) It appears by the report in Ld. Raymond, that the chancellor confented to allow a further argument by

civilians; but that the prohibition flood, upon discovering a defect in the pleadings.

## 16. Partridge's Case.

[Mich. 1 Ann. B. R.]

Prohibition to probate of will of lands and goods, upon fuggettion of nou compos, denied. Mod. Cafes 239. Cro. Car. 396. 2 Rol. 315. Hard. 131.

[553]

A Prohibition was prayed to the Spiritual Court to stay the probate of a will, which contained a devise of lands and several legacies, suggesting this matter, and that the testator was non compos; and the Marquis of Winchester's case, 6 Co. 23. was relied upon: But the Court denied that case, and said, that the statute of H. 8. never intended to lessen the jurisdiction of the Ecclesiastical Court as to the probate of wills. And to grant a prohibition might be inconvenient, for without probate the executor cannot fue for debts, which by this means may be loft, and the will unperformed. As for granting it quoad the land, it would be vain, (Vide 2 Ro. 315. 1 Sid. 141. this was the practice heretofore,) because it is no evidence either pro or con in any court of law, but a proceeding coram non judice; yet it is good as to the goods (a).

(a) In Montgomery v. Clark, 2 Aik. 379. Lord Chancellor Hardwicke said he had often thought it a very great absurdity that a will, which consists both of real and personal estate, notwithstanding it has been set asside at law for the insanity of the testator, shall still be litigated upon paper deapositions only in the Ecclesiastical Court, because they have a jurisdiction on account of the personal estate disposed of by it. He wished gentlemen of abilities would take this inconvenience and absurdity into their

consideration, and find out a proper remedy by the affistance of the legislature. But as the law stands at present, it is not in the power of the Court of Chancery to interpose, so as to stop the proceedings in the Ecclesiastical Court. The exclusive jurisdiction of the Ecclesiastical Court to decide upon fraud in obtaining wills, or the sanity of the testator, so far as relates to personal estate, appears in Archer v. Moss, 2 Vern. 8. Nelson v. Oldseld, 2 Vern. 76. Kerrick v. Bransby, 3 Bro. P. G. 358. Bennett v. Vade, 2 Ask. 324.

Vide Meadows v. Duchels of King ston, dab- 756. But if a probate is obwill decree the executors to be truffees for the next of kin, or to consent to a repeal of the probate by the Spiritual Court. Vide Tucker v. Phipps, cited ia Beunefley v. Powell.

The probate, if unrepealed, is conclutive evidence of the goodness of the

will upon an indictment for forgery, Rex v. Vincent, Str. 481. Rex v. Rhodes, Str 703. With respect to the conclusive effect of a direct fentence of a Court having competent jurifliction, vide Blackbam's Cale, 1 Salk. 290., and the authorities there cited; and Bater v. Princhard, 2 Aik.

Matthews versus Burdett. Hill. I Ann. s. c. ante 482. Vide this Case, title Universities and Post. 67a. Schools.

Chambers versus Sir John Jennings. S. C. Farefl. [Hill. 1 Ann. B. R.]

A Suit by libel was in the Court of Honour for these Prohibition to words, viz. You a knight? You a pitiful inconsiderable the Court of Honour. Vide fellow. And a rule was made to shew cause why there Lutw. 1053, should not be a prohibition: Against which it was urged, 1054. Patliathat there would be no remedy in this case, if this was to 67. I Show. not allowed. Holt, C. J. doubted whether there was or 353. 1 Lev. 230. could be any fuch court; but faid a prohibition would lie 4 Mod. 128. to a pretended court; and after no one precedent could be 1 Sid. 353. found of such a suit for words in the Court of Honour, &c. Hawk. 9, the Prohibition went absolutely.

10 Lutw. 1057.

#### Anonymous. 19.

[Hill. 2 Ann. B. R.]

PROHIBITION Les for denying a copy of the Prohibition lies libel to any Ecclesiastical Court: Nam jura Ecclesiastica to the Spiritual Surge limitata; and the party ought to know whether the full for denying matter be within their jurisdiction, and how to answer. a copy of the 1 Ro. Rep. 337. Dighton's case. Et Mich. 2 Ann. B. R. libel, but not to Admiralty. It was faid by Holt, C. J. that it was formerly held by all the judges of England, that when there was a proceed- See 6 Mod. 156, ing ex officio in the Ecclesiastical Court, they were not 308. Hob. 79, bound to give the party a copy of the articles; but the 51. Ante 548. law is otherwise: For in such case, if they refuse to give pl. 3. 1 Vent. 2 Copy of the articles a prohibition shall go quousque it be 252. 1 Rol. Rep. 31.

given; and accordingly a prohibition was granted per Hard. 354. Cur. Nota tamen Pasch. 11 W. 3. B. R. Hall moved for 2 Vol. II. prohibition

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### Proof.

prohibition to the Admiralty for refusing a copy of libel; and it was denied per Holt, C. J. Quia n'est a state.

[554] Vide 6 Mod. 261, Poft. 656. 20. Foy versus Lister.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1171. S. C.]

Suggestion in case of tithes must be proved within fix kalendar months from teste of prohibition. Cro. Car. 203. Stat. 2 E. 6. c. 13. § 14. Carth. 461. S. C. Cases B. R. 206. Holt 672.

O N a modus suggested to pay every tenth day's n from April to November, skimmed and then made cheefe, in lieu of all tithe of milk, a prohibition granted to try the modus, and settle the matter; and u speaking to the goodness of the modus, these cases v cited. 3 Cro. 609. Mod. 909. Latch. 226. 1 Ro. N. 17. 648, 649. At last Mr. Eyre came and shev that the prohibition was tested the 29th day of No ber, and that six months, i. e. kalendar months (as ought to be, Noy 30. Hob. 179. Litt. Rep. 19.) were pired the 25th day of May last, and therefore he me for a confultation, because in all that time they had proved their fuggestion; and had it upon the sta 2 Ed. 6. And the Court agreed, that the statute tends to fuits for small as well as great tithes, and the fix months are to be computed from the teste of writ; and the case in Moore 573. wherein it is said t must be fix months in term-time, was denied. For p ing suggestions, vide Co. Ent. 462, 463, 4. Consultat for not proving them, vide Asht. 444. Thes. Brev. Note; The entry in Ashton is ill in the award of costs, for there ought to be a judgment. Yelv. 1 Brownl. 98.

### [ 555 ]

Videtit. Evidence and Witnesfes. 1 Salk. 278, 281, 286. Poft. 691. Fazell. 129.

### proof.

### Bredon versus Gill.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 219. S. C. E 3 Ld. Raym. 179.]

Commissioners of appeals according to 12 Ca commissions taken commissions was, whether the depositions of with

witnesses, and their examination written down by the before commistlerk of the commissioners of excise, should be allowed finners of excise, to be read in evidence on this appeal? Or, Whether the mine the witwitnesses should not be brought in again personally, and nesses de notes. be examined viva voce? The commissioners of appeals unless dead. See thought the depositions sufficient, and proceeded there271. S. C. upon; and a prohibition was moved for, but denied at 1 Chan. Caf. first, because this had been the course ever since the sta- 23, 175, 236. tute, and it was a fummary proceeding: That it would 260. 15. occasion trouble and delay to the revenue to bring in all 291, &: 5 Mod. the witnesses again; and it was but proper the commis- 211, 380. soners of appeals should have just the same evidence the Comb. 414. full commissioners had. So it is in an attaint, and the law does not make viva voce evidence necessary, unless before a jury. In other cases depositions may be evidence: If it were not so in this case, they would be to try the matter de novo, instead of trying an appeal. pflea Pasch. 9 W. 3. B. R. mutata opinione, the Court held, That the commissioners of appeal ought to examine the Vide Bur. S. C. witnesses de novo on the appeal; that it was the intent 136. 3 T.R. of the act, and the commissioners had a power given for that purpose, to administer oaths: That this was just, because the first fentence might be by default, or the de-Politions might misrepresent, or not represent the whole case; and that on appeals upon orders of justices, examination is always de novo. And a prohibition was granted; but Holt, C. J. said, his private opinion was, that if the witnesses were dead, they might use their depositions. Vide Farest. 129. The transfer-books of the East-India Company allowed as evidence, &c.

## Property.

[556]

Vide 7 Co. 17. b. Kelw. an 4 Leon. Cal. 2n r. 2 Lean. 36. 11 Co. 82.

Sutton versus Moody.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 250. S. C. Comyns 34. S. C. 1

THE plaintiff brought trespass for breaking his close H. has the proand hunting there, & centum cuniculos suos adtunc & perty of things indem invent. occidit, cepit, & asportavit; verdict was for killed in his own the Plaintiff, and entire damages: And it was objected in grounds. Vide arrest of judgment, that H. cannot have a property in 11 Co. 17. b.

M 2 conies Et post. 637,

667. Cro. Car.
551. Comb.
458 S. C.
5 Mod. 375.
S. C. 3 Salk.
250. Caf. B. R.
143, 145. Holt
608. Goods. 174
12 Hen. S. 9
22 Hen. 6.59. b.

conies which are fere nature, unless on a special account as if he has a warren of them, then he may say Que warrenam suam fregit, & cunicules suos cepit. Vide 1 Ci 553. F. N. B. 87. Reg. 93. b. 1 Brownl. 167. Cut contra: For a warren is but a franchise to keep them; a notwithstanding that, the owner has no more property the conies themselves than any man that has them in lown land; if H. starts a hare in my close, and kills I there, it is my hare; otherwise if he hunts her into t ground of a third person, then it is the hunter's. Jud ment pro quer.

[557]

Muantum Meruit.

See 1 Salk. 330. Post. 597.

Ante 439. Same name, but a different case.

#### 1. Snow versus Firebrass.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 611. S. C.]

Quantum meroit T H E plaintiff declared, that the defendant, in conformeat, drink, the declared in that the plaintiff had found him fulficite to time, well.

The meat, drink, washing, and lodging, pro diversis mension to time, well.

The meat, drink, washing, and lodging, pro diversis mension to time, well.

The meat, drink, washing, and lodging, pro diversis mension to time, and averred to pay him as much as he should be considered, and averred for the plaintiff, it moved in arrest of judgment, that the declaration short and uncertain as to the time or number of moral sed per Holt, C. J. The incertainty as to the length time, or number of months, can do no more harm incertainty as to the things, which has been often judged not to vitiate. It is enough to aver how much

deserved. Judgment pro quer.

See t Show. 342. 2 Saund. 373. Raym. 8.

### 2. Glover versus Rogers.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1155. S. C.]

Quantum omitted, but held well.

PI.AINTIFF declared that the defendant, in fideration that the plaintiff's testator had transpo for him such and such merchandizes, promised to pay plaintiff's testator tantas denar. Summas pro transportamenerchandize pradict. rationabiliter habere meruisset, and a that he deserved so much. Upon non assumption, verdict for the plaintiff, and judgment in G. B. And now a

of error was brought thereupon in B. R. and objected that the word quantum was wanting, and it is not faid who had deserved, and he avers he deserved so much for transportation of merchandizes. But the Court affirmed the judgment: Tuntum is enough, viz. The defendant promised Vide 1 Salk. 26. him to pay him fo much be deserved, and meruisset fignifies 2 Rol. 440. as much as ipfe meruisset; and there being but two persons in the record, it could be nobody but the transporter, and they must have been the same merchandize for which the promise was made, or otherwise the plaintiff could not have had a verdict; which has cured the want of pradict.

# Moverley versus Ley.

[ 558 ]

[Hill. 4 Ann. B. R. 2 Ld. Raym. 1223. S. C.]

ASSUMPSIT, and declares quod cum the defend. To be taken acant, in consideration that the plaintiff would provide cording to the him meat and drink, promifed to pay him as much as the parties. plaintiff babers meruit, and avers that he deserved so much. There were also other counts. Non assumpsit was pleaded, and verdict for the plaintiff, and entire damages. motion in arrest of judgment it was objected, that meruit should have been meruerit. The Court held at first, that this was not false Latin, but false sense, which is not cured by a verdict; and though a dash would help it, yet they could not by intendment supply a dash, for that was to make another word. This was moved feveral times, and having rested two terms, the Court gave judgment for the Plaintiff, faying, they must take the words of the declaration to be the very words of the promise, as if the words of the promise had been put in writing thus by the parties under their hands: in which case the Court ought not to Purfue a grammatical sense or construction, which makes the promise void, but to construe it so as to make the Parties mean somewhat, as it is plain they did, and that Fareft, 106. was to pay tantum quantum babere meruerit.

a Ld. Raym.

Vide I Saik. 43, 44. Lutw. 1084 to :130.

# Quare Impedit.

[Vide title Presentation.]

### Berkely versus Hansard.

[Mich. 3 W. & M. B. R. Rot. 569.]

Liu 139, 2. 1 Brownl. 161.

In quare impedit against A. and B. and the bishop, A. nonsuit after appropriate and B. made title, and the bishop pleaded that he emptory. Co. claimed nothing but as ordinary. The bishop died, A. came and furmifed this upon the roll, and prayed the plaintiff might reply; upon this an entry was made, Qued predict. quer. licet solemniter exactus non venit, nec est prosecutus breve suum pred. ideo consideratum est, &c. & breve episcopo. Upon this a writ of error was brought, and the judgment was affirmed: for it is a nonfuit after appearance, which in a quare impedit is peremptory. Vide 7 Co. 27. b. 2 H. 4. 1. b. 14 H. 7. 19. b.

200. Parliament Cales 164. Comb. 2: 5,300. Carth. 313. 1 Show. 413 441,493. Holt

S.C. 1 Lev. 17-, and 382, 4 Mod. 2. Dominus Rex & Domina Regina versus The Bishop of London and Dr. Lancaster.

[Trin. 5 W. & M. B. R.]

585. writ is general, guar ad nothrain foechat donationem.

N the great case of the quare impedit for the church of St. Martin's in the Fields, the defendant prayed over of In case of a pre-the writ, and pleaded in abatement variance between the writ and the count; the first being que ad nostram donationem spectat, the latter que ad suam donationem spectat jure prarogativa: And on demurrer it was objected, that the title by the writ is a title in fee, this in the count is only a turn pro hac vice; fed non allocatur; for the precedents are so, and the writ is always general. Shower pro def. Suppose then the king should have judgment by default, and a writ to the bithop, would this gain a general title to the crown, and become a usurpation? Holt, C. J. No; for where the king hath judgment by default in a quare impedit, he, as well as a subject, must by suggestion on the roll fet forth his special title. Respondens ousser awarded.

#### 3. Dominus Rex ver/us The Bishop of Chester, Pierce and Cook.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 292. S. C.]

A quare impedit the plaintiff declared, that Q. Eliza- King's grant of an Beth, on the 14th day of February, in the 12th year of Hob. 143. 3 Co. her reign, was seised of the advowson of Bedel, ut de uno groffo, and presented Syms: That the queen died, and it 101. Owen 43. descended to K. James, and he was seised ut de grosso: So to K. Charles, and that he was feifed ut de groffo, and pre- Doughty's Cafe. fented Wickham; and that afterwards Wickham died, and 5 Mod. 287, one J. Peirce, non habens jus, sed usurpando presentavit 335, 335, 297. Metcalfe: That K. Charles I. died seised, and it descended 440. S.C. to K. Charles II. &c.

Defendant pleads that K. Charles I. was feifed in gross; but that he, after his presentation of Wickham, by letters patent, granted the advowson aforesaid to one Thackston,

adtunc armigero, postea militi.

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Et quod pradicto tempore quo Peirce is supposed to have ulurped super dominum regem, ipse idem Peirce usurpavit Super diet. W. Thackston, and presented Metcalfe : Et quod Posea the said Thackston released the advowsion, and his right therein, to him the faid J. Peirce and his heirs, and

traverses the dying seised of K. Charles I.

The attorney-general prayed oyer of the letters patent, which reciting that Q. Elizabeth, in the 13th year of her reign, granted the manor of Bedel, with the advowson adinde spectan. to the earl of Warwick, and that the faid manor was come to Sir W. Thackfton, Knt. sciatis igitur nos dediffe & concessisse prafato Will'o Thackston mil. advocationem eclesia pradict., and thereupon demurred to the plea. Judgment was given in C. B. for the king, and a writ of error brought; and thercupon it was objected, that the advowson which the king meant to pass, was an advowion which Q. Elizabeth granted to the earl of Warwick, and that the faid grant to the earl of Warwick was void; for the queen, anno 12 regni fui, being seised of this advow fon ut de groffo, could not anno 13. grant this as an dvowson appendant, and that this is admitted by the desendant: And if this was an advowson in gross, and so descended to Charles I. his confirmation or grant to Thackfor upon a supposal wherein he was deceived, will be void; and that the faid W. Thackflon in the letters patent, and the W. Thackston in the grant, appear to be different Persons. On the other side it was urged, that the queen might be seised of this advowson as in gross at the time the presented, and at the time she died, and yet might be

1 Leon. 21, 201, Farl. Cafes 212. 3 Lev. 377. 4 Mod. 2:3. Hob. 224, 233. 2 And. 32, 36, 154. 3 Salk. 24, 40. Caf. B. R. 185. Show, P. C. 212. Skin. 651.

#### Quare Impedit.

[ 561 ]

feised of it as appendant when she granted it to the earl of Warwick, for the might have the advowfon again after the grant to the earl of Warnvick, and then present; and that the Court ought to intend every thing to make the king's grant good. To clear this, the Chief Justice, Rokeby and Eyre, Justices, held,

Sufficient to lav fe iin tempore pacis, tempore domini rebis.

1st, That the time of the seisin laid in the count was immaterially alleged, for it is sufficient to say, tempore pacis, tempore domina regina, and therefore it is not traversable: In trespass quare, &c. it is necessary to lay a certain time; yet even there the precise time is not material nor traversable, but any time before the suing of the writ may be given in evidence, à fortiori here, &c.

That which is immaterial is not admitted by not being tra-12. 2 Lev. 112. 2 Leon. 99. 1 Mod. 72.

Vide Str. 298.

adly, That which is not material nor traversable is not admitted nor confessed when it is alleged, and not tra-Ergo, as the plaintiff, upon non present. modo & verked. I Vent. forma, might give in evidence a presentation any time, so 2 5, 180. 11ev. the Court may intend it. Vide 1 Infl. 352. Hob. 71.

In grants where the king's intent appears to pais the thing, it shall pals notwith flanding falle secitals. Vide Heb. 143, 229, 230 3 Co. 4, 5.

8 Co. 56.

3dly, The grant of the queen, as recited, is faid to be inter alia, so there may be other words which are fufficient to pass an advowson in gross to the earl; and the intent of K. Charles I. is plain, and this confideration might be fufficient, as the relinquishing of a fuit against the king, or the furrender of a void patent is a good confideration for a new grant. And as to the recitals, which were not all answered, Helt, C. J. said, Where it appears by the recitals the king intended not to pass any thing he 5 Co. 93. 3 Lev. 40. 1 Co. 43. a. had an apparent right in, but only what was concealed, the recital will qualify the grant; which is Legat's cafe. 10 Co. But where there are words in the grant which fhew the king defigned to pass the land, though they were not concealed, there the grant shall be good to pass the

Grant to a knight by the name of esquire, is void. See 2 Intt. 668. 16 H. 6. 28. 18 H. 6. 8. € Co. 27. Litt. R. 81. Fard. 1'8. 1 Sid. 40 Farefl. 38. 2 Init. 581, 594, 665. 2 Cto. 679. Litt. Rep. 121. 1 Bulft. 21. 4 H. 7. 7. 32 H. 6 29. 8 Ed. 4. 23. 2 Inft. 594. Hut. 41. 9 Rep. 4c. 2 Cro. 240. i Ball. 21.

lands. Hard. 231. 4thly, Holt, C. J. Turton and Eyre, Justices, held, that William Thackston, Esq. in the plea, could not be W. Thackston, Kut. mentioned in the letters patent, for esquire is drowned in the name of knight, so that a knight cannot be an esquire; and a grant to A. B. Knt. is absolutely void, if A. B. be only an esquire. Knight is a name of dignity, and parcel of a man's name, as much as his Christian name. It was faid that it should have been averred, that W. Thackston was revera an Esq., but cognit. & reputat, miles at the time of the grant; but that would not have aided it, for a man cannot be a knight by reputation, for there can be no foundation for such a reputation; and it is not the party's faying in his plea, I am the man, that will explain the grant, but the identity must appear on the face of the grant itself. Upon this the judgment was affirmed by Holt, C. J. Turton and Egre, Juf-

tices:

tices; but Rokeby, J. held, that there was a fufficient demonstratio persona, and that it ought to have been reverled (a).

(a) This judgment was reversed in the House of Lords; Sho. P. C. 212. It was observed for the plaintiff in error, that, in case of grants, any description of the person is sufficient; and that it is the identity of the person which the law doth most regard and value. Vide the argument in Shower, where the several points arising on the case are elaborately discussed .-The injustice which might result from the doctrine that an error in the description of a person would avoid a grant, and that the identity could not he shewn, would in the present state of English jurisprudence prevent that doctrine from receiving much encourage-

## Due Estate.

### Scilly verjus Dally.

Pasch. 10 Will. 3. B. R. Inter Hill. 9 Will. 3. B. R. Rot. 476. S. C. Carth. 444. 747. 1 Ld. Raym. 331. S. C.]

N replevin the defendant avowed and fet forth, that Commencement J. S. was possessed of a messuage and 40 acres of land, of particular fetting out the time of the commencement of the leafe, effate must be and demised, rendering rent, &c. And that he being 231. 2 Mod. possessed of the reversion died, and it came to his executor, 143, 144.

and for rent-arrear he avowed. The plaintiff demurred, 2 Show. Cas.

and shewed for cause that the avowant had not shewn who 81. 5 Mod. 206. was lessor of J. S.: And for this it was held naught Per 3 Mod. 48. Cro. Holt, C. J. In debt for rent it is enough to fay dinnist: 182. 3 Lev. And if it be brought against an affiguee, that he demised 191. Raym. 3 2 to such a one, whose estate the defendant hath, is enough 2 Keb 87, 96. 1 Sid. 279.

for the lessor or his executor, (quare tamen of the heir,) Show 64. 3 Lev. without making a good title to himself; yet an avowry 133. Diversity differs from a declaration in many respects (b). In a debetween counts and avowries.

(b) By stat. 11 Geo. 2. ch. 19. § 22. defendants in replevin may avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon the distress was made, enjoyed the same under a grant or demise, at such a certain rent, during the time wherein the rent-diffrained for incurred; which

562 See Co. Lit. 303. 3 Lev. 19. 1 Lev. 190. 1 Salk. 363. 1 Mod. 231.

See 5 Mod. 150. Pult 629. 1 Lev. 190. 1 Sid. 293. 2 Sid. 10. Comb. Cafes B. R. 190.

rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of fuch tenure, &c.; for which tenements the rent, &c. was at the time of the distress, and still remains, due; without further fetting forth the grant, tenure, demile, or title of such landlord, &c.

claration

claration in debt for rent, nil debet is a good plea, and traverses the whole declaration; but there can be no general issue to an avowry, but some special point must be traversed; and therefore, because it does not appear out of what estate, or in what manner this term was derived, judgment must be for the plaintiff. Vide Cro. Car. 571. The Johnsv. Witney, reason why the commencement of particular estates must be flewed in pleading, is, because they are created by agreement out of the primitive estate; and the Court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed: And this good law. See is a fundamental rule, which ought not to be broken upon Cro. Car. 138. fancied inconveniencies (a).

3 Will. 65. Éafler 10 Geo. 3. C. B. Same point; and this case of Sully v. Dally held to be

Yelv. 74, 147. 3 Mod. 132. Lutw. 1492, 1497.

(a) This judgment was affirmed in Dem. Proc. 1 Bro. P. C. 77.

#### Recognizance, Statutes, Elegit, [ 563 ] Vide Farefl. Ertent. &c.

38, 97. Hob. 196. Cro. Car. 148. Cro. Jac. 2, 12, 449, &c. Vide Cro. Car. 341, 149.

### Hammond versus Wood.

[Trin. 3 W. & M. B. R.]

affign his interest after extent and liberate, if co-3, 12, 449. I Show. 281. 3 Lev. 312. 1 Vent. 42. 4 Mod. 48. S. C. 7 D. 166 p. 16. Stin. 300.

THE conusee of a statute had lands extended and delivered to him upon a liberate: The conusor being in possession, continued his possession; afterwards the exnufer continues tended interest was affigued; and the question was, Whe-Vide Farell. 18, ther it was affiguable? The Court held not: It was ob-97. Cro. Jac. jected, that before entry by the conusee, this was like an interesse termini, or the interest of one that has a lease to commence at a future day, which is affignable; so here the conusee hath an estate before entry. Sed per Holt, C. J. By return of the extent an interest vested in the conusce: The end of the liberate is to have an actual posses-Holt 611, 263. sion of the interest; and it must be taken that he has by the return of the liberate; the sheriff returning thereupon liberari feci, the conusce is estopped to say otherwise: If then the conusor continues to keep possession after this return, the conusee's estate is turned to a right, like the case of diffeisee making continual claim, as soon as ever the diffeifee leaves the premises, the continuance of posses-

sign by the disseifor makes a fresh disseisin. Vide t Inft. 156. Lit. 129. And this is not like the case of mortgagor, who continues in by consent, and not in opposicion to the mortgagee.

#### Putten versus Purbeck.

Vide Cro. Jac. 12.

Trin. 12 Will. 3. B. R. 1 Ld. Raym. 346, 718. S. C.]

TO a scire facias upon a judgment, the defendant On elegit, if the pleaded in bar, that the plaintiff had before sued an more than a elegit on the same judgment, directed to the sheriff, who moiety, the exe-Thereupon returned an inquisition taken, and a delivery of cution is void. Fuch certain parcels thereof (a). [Et nota, the parcels to Cales amounted to more than a moiety,] and prayed judgment, B.R. 355. If the plaintiff should have any other execution; to which Carth. 453. S. C. it was demurred; and the Court held that the execution 1 Sid. 91, 239. was merely void; for the sherisf had only a circumscribed authority, and had exceeded it; and if the plaintiff had brought an ejectment, he could not have recovered the possession on this title, and therefore should be at liberty to pursue a more effectual execution.

[564]

(a) Separate lands may be extend- ty of the whole. Den v. Ld. Abinged, provided they do not appear to don, Doug.472. amount in value to more than a moie-

### 3. Domina Regina versus Ewer.

[Pasch. 1 Ann. B. R. 2 Ld. Raym. 756. S. C.]

A Scire facias was brought on a recognizance taken before Certiorari to remove an inmove an indicament from the sessions of the peace, which upon over sedens, unless rewas entered in hac verba, and was for 40 l., whereas the cognisance enfum prescribed by the statute is 20 l. Et per Holt, C. J. tered into in 20l. Vide I Salk. 147, Before 5 & 6 W. & M. c. 11., any judge might take a 148, 149. recognizance, which is not taken away; but if it be not Farell. 9, 120, according to the statute, which is in 20%, the certiorari 3 Salk. 369. will be no supersedeas; yet whether it be or no, it is still Holt 612. Vide good as a recognizance at common law.

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Str. 1165. Bur. IO.

Vide post 600,

Shuttle versus Wood.

659. 6 Mod. 42. 2 Leon. 24. [Mich. 2 Ann. B. R. 2 Ld. Raym. 966. S. C. by the name 1 4 B/6 410.

In C. B. if recognizance be taken at a judge's March 159. 45c, 645. Cro. Car. 481.

N debt on a recognizance of bail in C. B., the plaintiff declared that the defendant per scriptum suum obligatochamber, it must rium recognit, in curia dicte domine regine de Banco coram be so declared on; Thoma Trevor mil. & sociis suis, &c. Desendant pleaded but in B. R. as nul tiel record: the recognizance certified, appeared to be is taken in court.

Vide Hob. 196. taken before Mr. Justice Nevel, at his chambers. Et per tot. Cur. The plaintiff hath failed of his record, and hath 6 Mod. 42, 132. varied in his description from the recognizance. Et per S. C. Akyn 12. Varied in his description from the recognizance. Et per Cro. 312. S. C. Holt, C. J. If it had been entered as taken in court, then D. 314. p. 6. it had been well enough. In this court the course is al-Holt 612. 2 Cro. ways to enter them as taken in court, though taken actually by a judge in his chamber, and in this court they are not taken in a fum certain, as in C. B., neither are they a record till entered; but in C. B. it is a record immediately upon the first caption, and binds the lands be-Vide Lut. 1287. fore it be filed at Westminster, and when it is filed, then it is a record in court, and a fcire facias or debt lies upon it, either in Middlesex where filed, or in London where taken; whereas on a recognizance in this court of B. R. the action or scire facias must always be brought in Middlesex,

Barnes 96, 207. 2 Bl. Rep. 7(9. 2 Bur. 409.

[ 565 ] See a Saund.

254, 393. 6 Mod. 18, 245, 257. S. C. 5 Mod 8, 9. Holt 613. Vide 1 Sid. 429. 6 Mod. 103. Lutw. 332. 2 Salk. 298.

In escape the

plaintiff did not allege the commitment prout patet per recordum, but well on general demur ser. Vide 3 Lev. 311. I Lutw. the stat. 4, 5 Ann. c. 16. 1 Kcb. 761.

## Records.

### Waites versus Briggs.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 35. S. C.]

N debt for an escape the plaintiff declared the prisoner was committed and escaped, and because he did not fay prout patet per recordum, the defendant demurred generally; but the plaintiff had judgment; for the gift of the action was the escape, and the commitment only inducement. Et per Holt, C. J. In debt on a judgment quod cum recuperasset, is good without a prout patet per recordum; and the defendant may plead nul tiel rewed. Et per G. Eyre, J. The matter here is grounded on the fact, for nil debet is a good plea, and not on the matter of record.

And the rule in Co. Lit. 303., where the difference is 1 Lev. 137. taken between cases, where the record is the very founda- 1 Sid. 216Hob. 210tion, and where inducement is a good diversity. Vide 1 Sound. 336. 2 Sid. 16. Judgment for the plaintiff.

1 Salk. 238. Hob. 233.

Show. 4. Farefl. 53. Vide Str. 1226.

#### Dominus Rex versus North.

[Hill. 8 Will. 3. B. R.]

DER Holt, C. J. It is an error in the clerks in London, Upon a certiethat upon a certiorari they return only a transcript, as rari the very reif the record remained below; for in C. B., though they 6 Mod. 188. do not return the very individual record, yet the transcript is returned as if it were the record, and so it is in judgment of law.

# Thompson versus Leach.

S C. ante 427. Poft 576, 618,

[Pasch. 9 Will. 3. B. R.]

DER Holt, C. J. You ought not to move to read a Roll of precedent word of a record, in order to make a confilium, where filed. Vide the roll is of a precedent term, unless it be filed; for you 3 Lev. 219. S. C. ought not to have a loose roll, unless it be a roll of that Eq. Ab. 178. p. 3. 3 D. 164. term of which it ought to be a record. P. 13. 3 Sain. 2 Vent. 198. 300. 1 Show. 296. 3 Mod. 296, 301. 3 Lev. 284. Show. P. C. 150. 2 Vent Camb. 488, 468. Carth. 211, 250, 435. Helt 357, 623, 665. Cafes B. R. 475.

### Moor versus Manucapt. Garret.

[ 566 ]

[Mich. 10 Will. 3. B. R.]

A Scire facias against bail; the defendant pleaded, that no Upon nul t'el recapies iffued forth against the principal; the plaintiff cord pleaded of replied and fet out the capias prout patet per recordum, &c. sime court, day Defendant rejoins nul tiel record. Plaintiff fur-rejoins, ba- may be given to betur tale recordum, and prayed that the Court will inspect it in, or for the the rolls, &c. The defendant demurs, and the Court juffices to infiect held this demurrer was ill: Upon nul tiel record pleaded, the record; but where it is a record of another court, the other party redeemdant cannot demur. Vide plies, quod babetur tale recordum, and the Court gives him 3 Lev. 143. a day to bring it in: But if H. pleads a record of the same S. C. Cases Court, the other fide may crave oyer, &c. (a), or may plead H. R. 214. aul tiel record, and then there are two ways of proceeding in such case; for either the Court may give the party a

, (a) Vide 1 T. R. 150. contra.

day to produce the record; which entry is, et dictum eff prafato defendenti, quod babeat recordum bie tali die fub fue pericule, &c., or the Court may give day to inspect the record themselves. Et quia justiciarii bic se advisare volunt. super inspectione & examinatione recordi per pradict. defendentem superius allegati dies datus est partibus prædict. bic usq: &c. Vide Dy. 228.

But in the principal case, what does the defendant do by his demurrer, but deny that the Court can inspect the records in the Court before them? which they may most undoubtedly; therefore judgment must be given against him.

#### 5. Anonymous.

[Trin. 11 Will. 3. B. R.]

Printed flatute not evidence upon nul tiel re-Vide Str. 446. 3 Salk. 330. Sty. 122, 155,

I N an action against H. defendant pleaded the composition-act; the plaintiff replied nul tiel record; upon the cord. 3 Lev. 243. day given to bring in the record the defendant brought in the printed act. Et per Holt. C. J. An act printed by the king's printers is always allowed good evidence of the act to a jury (a); but was never allowed to be a record yet: You must get an exemplification under the Great Seal, and then plead it exemplified, and then no man can deny it.

(a) Bull. N. P. 225. In private acts of parliament the printed statute-book is not evidence, though reduced into the same VOLUME with the general statutes; but the party ought to have a copy compared with the parliament-roll, for they are not confidered as already lodged in the minds of the people. However, a private act of parliament in print that concerns a whole county, as the act of Bedford Levels, for building Tiverton, &c. may be given in evidence, without comparing it with the record. And these things are the rather admitted, because they gain some authority from being printed by the king's printer;

and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown: and, for this reason, printed copies of other things of as public a nature have been admitted in evidence, without being compared with the original; and the printed proclamation for a peace was admitted to be read, without being examined by the record in Chancery. A gazette which contains any thing done by his majesty in his character of king, or which has passed through his majesty's hands, is admissible evidence in a court of law to prove such thing. Rex v. Hole, 5 T. R. 436. Vide form of pleading an exemplification, 8 Co. 8. 6.

#### Turner versus Barnaby.

[Trin. 2 Ann. B. R.]

N ejectment, the defendant being called to confus lease, Act of the court entry, and ouster, made default, and that default was be altered the recorded. Afterwards the plaintiff would have waived it, fame term, of during the term. Et per Holt, C. J. There is a diverPoff 649. See supposing the record of it to be in the breast of the Court the party, not. fity between an act of the Court done upon record, for Ray. 69. 3 Lev. that is in the breast of the Court, and may be altered by 219. them during the term, and an act of the party recorded by \* [ 567 ] the Court, as a nonfuit or default; for that once recorded, cannot be altered by the Court; for that would be a means of introducing fallity in matter of fact into records.

# Common Recoveries.

Vide 1 Co. 14, 61. 2 Co. 74. 5 Co. 40. Lit. R. 234. 2 Lev. 31. 2 Mod. 70. Lutw. 1549. Post 591.

### 1. Sir John St. Albans's Cafe.

[Trin. 1 W. & M. C. B.]

IR John St. Alban's being of the age of nineteen years, Recovery sufhis fifter, who was the next in remainder, and also his fered by an in-fant. 1 Sid. Tr, married one of his footmen. He petitioned the king 321. 2 Keb. leave to suffer a common recovery, who referred it to 141. Styl. 246. judges of the Common Pleas, before whom feveral Cro. El. 321.

judges of the Common Pleas, before whom feveral Cro. El. 321.

1 Mod. 48, 246,

cedents of recoveries, fuffered by infants upon privy 247. 3 Lev. 36.

1s, were cited, viz. One Bivarny, the 1st day of June, 1 Vent. 69.

Car. 1. One Young, the 23d day of November, 11 Car. 1. 2 Vent. 30, 90. other, 13 Car. 1. Another, 14 Car. 1. Another, Jac. 2. Another, 4 Jac. 2., by Toby. Another, Jac. 2. Another, by John Croke, fon of Sir John Che, 10 Car. 2. The judges observed, that seven of the titions were by fathers upon the marriage of their fons, Vide I Vern. an equal recompence given; whereas here was neither 461. Her nor marriage in the case; and they said this case been carried too far already, therefore disallowed it. Ede Heb. 196. 1 Ro. 731. 1 Cro. 307. (a)

Common recoveries suffered by acts of parliament are universally sub-fituted in their stead. 2 Craise 81.

#### Common Recoberies.

# Clithero versus Franklin & Ux

[Pasch. 2 W. & M. C. B. Rot. 207.]

mainder to the heirs male of A. on the wife tegotten; A. cannot dock this Q2, {23.

To A. and his N a writ of ayel the iffue was, Whether the gran wife for life, redied seised in fee? The jury found that the g ther covenanted to stand seised to the use of himse Mary his wife for their lives, remainder to the hei of the grandfather on the body of the faid Mary be during the wife's with remainders over. The grandfather fuffered a co S. C. Lilly Ent. recovery, and died; Mary survived. To prove th very void [good], it was infifted, that Owen and M case (a) was not law; for if baron and feme had tierty, then each had the whole, and the baron make a tenant to the precipe for the whole. Pe contra, That case was never yet questioned; the estate hinders the intail from executing in the bar that it is only a kind of contingent estate after the d the wife, and the intail cannot be tacked to the ef life of the husband, during the life of the wife; during her life there is an intervening estate; and ingly adjudged. 3 Co. 6. Plo. Manxlo's case 8, 9. 320. 1 Sid. 83. (b)

with fingle voucher, and the grand-father tenant to the pracipe; so that part of the freehold being vested in the wife, the recovery could not be valid. But if the grandfather had conveyed the estate to a tenant without the concarrence of his wife, and come in as vouchee, it would have been sufficient. Cappledike's case, 3 Rep. 5. Fitz William's case, 6 Rep. 32. Hallett v. liam's case, 6 Rep. 32. Saunders, 2 Lev. 107. Even in cases where the immediate inheritance in tail is vested in the wife, the husband may convey the freehold by deed, and make a good tenant to the præcipe; Cruise on Recoveries, 29. Butl. n. Co. Lit. 325, b. Pigott 72. Gilb. Ten. 108. Co. Lit. 273. b. If there are two joint-

tenants, and a recovery is suffered

against one of them, it is good for a

moiety, Marquis of Winchester's cale,

3 Rep. 1. Upon a limitation to a man

and woman who afterwards intermarry,

they take by moieties, Hallett v. Saun-

(a) 3 Rep. 5. a.
(b) In this case the recovery must

have been (as in Owen v. Morgan)

ders, ubi sup. By stat. 14 Geo. 2 it is not necessary to obtain su from lessees for lives in order to good tenant to the pracipe; but tenant for life, or other greate expectant on the determination leafes, must join in conveying : for life to the tenant. A., te 99 years, remainder to trui preferving contingent remaind mainder to the first and othe A. in tail, A. and his eldeft for in fine to make a tenant to the it was held that the fine of to years was void, and so no freeh veyed; Dormer v. Packburgt, 135. 4 Bro. 40; A. tenant remainder to B. in tail; B. re in ejectment against A., and possession by feoffment made ( to the pracipe, and suffered a re A. in a subsequent ejectment re against B., and it was ruled feoffment of B. did not co estate of freehold to support covery; Atkyns v. Horde, 1 . 5 Bro. 241. Cowp. 689.

# Lloyd versus Evelin.

S. C. I Show. 347.

[Pasch. 5 W. & M. B. R.]

Na writ of error of a common recovery, the tenant Tenant by fine, to the pracipe in the common recovery was made by a &c. Vide Noy fine, the recovery was suffered, and the fine was reversed, 170, 262. Vide yet it was held a good recovery; for there was a tenant to Skin. 3, 63.

Butl. Co. Lit. the precipe at the time.

203. b. n. r. Cruise 26.

#### Lacy versus Williams.

S. P. I Show. 347· 218. z Mod.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 227, 475. E. C.]

ERROR of a judgment in C. B. in ejectment, where- If tenant gain in a special verdict was found, viz. that a writ of the rechold at any time before entry was brought against Miles Corbet, ret. Quindena judgment, good. Martini. That upon the return Miles Corbet appeared, Vide Cro. Jac. and the demandant counted against him, that he vouched 455. Lutw. Lacy the tenant in tail, and a summons ad warrantizandum 472. S. C. iffued, returnable octabis purificationis. After the teste and Comb. 425. before the return of the writ of summons, viz. the 1st Hole 614. day of January, Lacy the tenant in tail conveyed to Miles Corbet by lease and release for life. At the return of the functions, Lacy the tenant in tail appeared and entered into the warranty, and vouched over the common vouchee, fo.a common recovery was had. This recovery being held good in C. B. serjeant Pratt, for the plaintiff in error, infifted, that Miles Corbet was not tenant to the Precipe at the return of the writ of entry. He agreed that he had purchased before the return of the writ of entry, recovery had been good, (otherwise if after, as in this case,) to bind strangers or the issue in tail, though it Bht be good between the parties by way of estoppel. 9 E. 4. 12. 3 H. 6. 34. Ratio eft, because the tenant could not render the lands at the return of the writ of enery, and a voucher supposes a seisin; for it is a good nterplea that the voucher had nothing in the lands at the time of the voucher, and the nec unquam postea is not terial; and if the tenant pleads not non-tenure as he Sht and might, that only binds himself and those that parties and claim under him by estoppel.

Rene contra argued, that the issue shall be bound where may have execution for the value. 3 Co. 5, 6. 12 E. 5. And it is not a fufficient counterplea of a voucher Tay, the voucher had nothing tempore, &c. without adding nec unquam postea, Raft. 367, 126. Soit is of non-

[ 569 ]



2 Roll. Abr. 865. Brook, Brief, pl. 75, 77. I Inft. 102, 365. Hob. 21. Non-tenure cured by fuble. quent purchase. Q. 1 Mod. 218. 1 Show. 347. Lutw. 1549.

tenure, Rast. 273. Where the tenant appears on the return of the writ of entry, and a recovery is then had, in fuch case the tenant must have the freehold at the return of the writ, because it is a recovery then suffered; but otherwise where there is a voucher over, or interpleader, as in this case; for it is sufficient if he become tenant be-

fore judgment. 41 E. 3. 5. 8 E. 3. 32. 10 E. 3. 21.

Holt, C. J. It is not enough in a counterplea of a voucher to fay, the voucher had nothing in the lands at the time of the voucher, without nec unquam poffee; so it is of non-tenure: If the tenant to the pracipe gains a freehold before judgment, it is sufficient, for it cannot be faid to be a recovery against him that had nothing; therefore a writ may be made good by a subsequent purchase, and fo may a voucher; and it is the more reasonable, be-29, 55. 2 Lutw. cause the demandant may have a good cause of action, though the tenant beauty have a good cause of action, though the tenant have not the land; for it is not his being tenant to the pracipe, but the demandant's having a right to the land, that is the foundation and cause of action; and therefore it is in law sufficient, if the tenant have the land to render at any time before judgment (a). And the judgment was affirmed nife caufa. Afterwards Mr. Squib came to shew cause why the judgment should not be affirmed, and cited 18 E. 3. 13. 18 E. 4. 26. 2 Ro. 746. Sed non allocatur: And Holt, C. J. faid, The recompence in the case of common recoveries was ratio una, but non unica; for a reversion expectant is barred by a common recovery, and yet the recompence cannot extend to that; which he faid was a bold advance in favour of common recoveries (b). This rule was made absolute.

(a) By stat. 14 Geo. 2. ch. 20. recoveries shall be good notwithstanding she fine, or deeds making tenant to the writ, should be levied or executed after the time of the judgment given in such recovery and award of writ of seisin, provided the same appear to be levied or executed before the end of the term, &c. in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same. Goodright ex dem. Burton v. Rigby, 2 H. Bl. 46. 5 T. R. 177. A recovery was held

good, although the tenant did not acquire the estate until after the day on which the writ of feifin was returned to have been executed.

(b) Recoveries are now confidered by the Courts as common affurances, which it is useless and absurd to examine, according to any original principles. Taylor ex dem. Atb v. Horde, 1 Bur. 115. Selwin v. Selwin, 1 Bl. 254. Martin v. Strachan, 1 Wilf. 73. Doe ex dem. Crow v. Baldwere, 5 T.R. 112.

#### Page versus Hayward.

[Trin. 3 Ann. B. R.]

HABE .

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Piggot on Recoveries, 176, &... S. C. more fuit than in any other book.

NICHOLAS SEARLE by his will devised to his S.C. 3 Salk. 96. niece Mary Bryant and the heirs male of her body, 135. Rep. A.Q. Holk 61E. Holk 61E. have iffue male by one furnamed Searle; and in default of both conditions he devised to Eliz. Bryant, [in the same manner, and in default thereof he devited to George Searle for fixty years, if he so long live, remainder to the heirs 1 Saund. 180. male of the body of the said George, and their issue male 2 Lev. 21, 22. for ever. Mary, and Elizabeth with her husband, (for the 1 Leon. 283. had then married one Ciff,) joined in a fine to make a 1 Vent. 199 to Savery vouched Mary Bryant, Eliz. Cliff and her busband, 300. 10 Co. 41. and the wife of the devisor with her husband, she being <sup>a</sup>gain married, and vouched them all jointly, and they rouched over the common vouchee. Et per Holt, C. J. tat. Cur. it was adjudged,

Ist, That the estate devised to Mary was a good estate- To A. and the sail, and so was the estate to Elizabeth; but it is a special by one of the begotten by a Searle, which is a middle intail; not the is tail. Vide post for decrease. shelt nor the least; for it might have been to her and post 619, &c the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate-tail withthe statute de donis, for it is within the reason of the Matute.

2dly, The words, upon condition, &c. though they Words founding conditional tuken as limitation in litation; fo it is held in 1 Vent. 199, 202. And Holt, a will. Vide J. said, he saw no reason why they might not be so 2 Co. 72, 73, 74, &c. Str. 102.

J. said, he saw no reason why they might not be so 2 Co. 72, 73, 74, &c. Str. 102.

Doug. 63. 4 Eu.

Far; and so the sense shall remain over.

C.R. Cruiseria. Pon her death, the estate shall remain over.

3dly, That the estate-tail of Mary and Elizabeth, or 55. Randal v. Either of them, does not cease by marrying one that is Payne. a Searle; for the remainder over is in default of both nditions, and in the mean time it is limited to her and heirs male of her body, and the may furvive the first Dand and marry a Searle, and so there is a possibility as ng as the lives.

Vide 1 Bro. Ch,

4thly, If the estate had been to Mary and the heirs Condition that ale of her body by a Searle to be begotten, provided and runs with the Pon condition if the do marry any but a Seurle, that then land cannot be barred by reco Covery suffered before marriage will bar the estate-tail of condition collected before marriage with another. and remainders; and though the after marry with another.

it shall not avoid the recovery: And the Court took a difference between a collateral condition and a condition that runs with the land. If the donor referve a rent with a vi. 4Bur. 1936 condition to re-enter, a recovery will not bar it; otherwise if it be to re-enter for non-payment of a sum in gross. Vide 1 Mod. 103, 111. 2 Lev. 28, 60.

And as to common recoveries (being of great use) the

Chief Justice defired to speak largely.

Tenant in tail, and he in remainder may be vouched jointly. Noy \$1, \$2. 3 Co. Cupledike's Cafe, I And. 275. Vi. 2 Atk. 324. Cruife 114. 1 Inft. 276. 8.

1st, If tenant to the precipe vouches tenant in tail in possession, and him in remainder jointly, and they jointly vouch over the common vouchee, this is good; not but that it may be more regular, that the tenant vouch Mary Bryant, and she Elizabeth, and she over the common vouchee, that the recovery in value may not be joint, but enure severally. Yet the other way is sufficient; for where in an adversary action a pracipe is brought against several, it is enough that one hath the tenancy of the land; and if he would plead that he is fole tenant, and traverse that the others have any thing, the defendant may admit that, and proceed as to him, and the writ shall only abate as to the rest; also the others may disclaim; and as a joining a stranger with a tenant does not hurt, so a joining a stranger with a vouchee does not; for he is but in les Br. Several Tenancy, 3, 4. 10 H. 6. 14. Raft. 276.

If tenant vouches a firanger, who vouches tenant in tail, and he enters into warranty, it is good. 7 Vente 358. 2 Co. 60, 61. Cro. EL 562.

adly, If tenant in tail makes a tenant to the pracipe, and he vouches a stranger, and the stranger vouches a tenant in tail, and he the common vouchee, that is good; for his being a stranger is not material, because in judgment of law he is become tenant by the voucher to the pracipe, and a release to him is good, and the voucher is good, whether there be a real warranty or not. At common law, if a stranger was vouched, the demandant could not counterplead it; but by West. 1. c. 40. he may, if he be absent, counterplead the voucher, viz. that the voucher and his ancestors never had any thing in the land; not if he be present. It is enough that tenant in tail comes in and owns a warranty, for there may be a warranty. Suppose an adversary action against tenant in tail who has a warranty, and he makes a feofiment in fee with warranty, or has levied a fine with warranty, and the feoffee or conusee vouch the tenant in tail, he may make use of his warranty, and yet he was not seised of the estate-tail; but in that case he may dereign the warranty, and then he recovers in recompence of his estate-tail; for whenever tenant in tail comes in as vouchee, he comes in in privity of all estates he ever had, and consequently may dereign the warranty. Vide 1 Inft. 385. a.

And the Chief Justice said, The vouchee's being a stranger was not material; because, though there be no real warranty, the recovery in value is the same, and the ad-

mittince of tent it in tail has made it real.

Tenant in tail coming in as wouchce comes in in privity of all effaces he eyer had. 3 Co. 60, 61. Plowd. 3. a.

# Recusants.

Vide t Lutw. 201, 208.

[Vide title Church of England.]

### Domina Regina versus Peach.

[Mich. 3 Ann. B. R.]

A Differenting minister having qualified himself according Licence to different to the toleration act in one county, kept a convenient minister involved in one county; and afterwards removed into another, and kept a new conventicle without a new qualifiered to another, and kept a new conventicle without a new qualifiered to another. cation. The justices convicted him, notwithstanding the ther. 6 Mod. toleration act. The attorney-general moved for an at- 228, 310. S.C. tachment against the justices, but it was denied; then he moved for a mandamus to permit him to preach, and that was denied also. The Court held, 1st, That a mandamus always to do some act in execution of law, whereas Noy 117. Lane this would be in nature of a writ de non molestando. 2dly, 60. I Lutw.
That a differing minister is still liable to the old penal 54. 2 Cro. 242. for preaching in conventicles unless he qualify him- 3 Lev. 62. felf according to the act of toleration. 3dly, That a Ecence inrolled at the fessions in one county, will not extend to another county; but he must have a licence Trolled in the county where he preaches. But note; The is fince altered in this particular, by the act for pre-Trying the Protestant religion, by better securing the Church of England. 10 Anne.

# Release and Defeazance.

Poft 575.

1. Aloff versus Scrimshaw.

[Trin. 1 W. & M. B.R.]

M debt on a bond for 1000/, the defendant pleaded a Covenant not to covenant fince made by the plaintiff, whereby he co-fue for a certain time is not a remanded not to fue for the faid debt upon the faid bond, release or desease  $N_3$ 

Holt 619.

zance. Raym. for and during the term of 90 years: This was held naught 187, 393, 413. upon demurrer, for it is but a mere covenant, and doth 66, 47. Comb. not enure as a release or deseazance, and so cannot 123. Carth. 63. be pleaded in bar. Vide 1 Cro. 352, 623. 1 Ro. 939. 21 H. 7. 24. (a)

(a) The ground of the decision in this case appears to be, that a personal action once suspended by the act of the party is gone for ever; ante 302. Dyer 140.; therefore the covenant must be either an absolute discharge, or a mere covenant; the former of which, being manifestly repugnant to the intent, thall not be implied. The same point

was ruled in Dowse v. Jeffreys, 1 Rol. 939. 11 Vin. 461. But it was held in that case, and also in this, according to the reports in Show. and Comb., that a covenant not to sue generally will operate as a release. The same was ruled in Searville v. Edwards, cited 1 Ld. Raym. 420.

#### Clayton versus Kynaston.

[Hill. 10 Will. 3. B. R. Intr. Trin. 10 Will. 3. B. R. Rot. 246. 1 Ld. Raym. 419. S. C.]

One deed not to Cro. Car. 426. Cro. Jac. 300,

CLAYTON, the executor of Clayton, the executor be confirmed as a of Wintersball, brought covenant against Kynasson upon another without articles, and declared as on articles made between Killinecessity. Vide green and the said Kynasson, and others ex una parte, and Wintersball ex altera parte; wherein it was covenanted, that 623. 1 Lev. if Wintersball should be minded to give over asking plays, 2.12. Post 575. and should give notice in writing three mouths before he S.C. 3 Salk. left off, that then three months after such notice in writ-221, 415, 548. ing, Wintersball should be allowed for every acting day Holt 178, 218. es. ber day, and that after the last of 5s. per day, and that after the death of Wintersball, 100%. should be paid to his executors within three months; prowided fuch notice should not be given but in an acting week; and for breach assigns that the 100 l. was not paid within three months after Wintersball's death. The defendant pleaded that at the same time another deed was made between the said Wintersball of the one part, and the said Kynaston of the other part, wherein was contained the fame agreement; and then it was farther covenanted by Wintersball in the same deed, that in case he gave notice as aforefaid, then the faid Kynaston should be discharged of all debts, and be indemnified and faved harmless from all agreements or securities at any time before made, or hereafter to be entered into; then he avers notice was given, and that three months elapsed, &c. and so relies upon this as a defeazance. To this there was a demurrer.

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ist, It was urged for the defendant, that this was a deseazance; for whatever the desendant lost in this action would be recovered against him on his covenant, which was but circuity of action. Vide 1 And. 307. Mo. pl. 80. 2 Saund.

2 Saund. 47, 48. One deed a defeazance to another made at the same time with it. Vide 1 Inft. 265. Rebutter founded on the same reason.

The Court agreed, that if A. he bound to B., and then Vide 1 T. R. B., reciting this bond, covenants to fave him harmless, 446. 3 Lev. 41. this is an absolute defeazance; and if it be to save him 2 Vent. 218. harmless on a contingency, it is a conditional deseazance, because it hath an express relation to the deed; but in the principal case there is not a relation between the deeds; but on the contrary, the plaintiff's deed is only to indemnify against all covenants heretofore made, or hereafter to be made. There is therefore no necessity to construe the defendant's deed to be void and useless as soon as made, or that one deed has destroyed the other which was made at the same time with it, or that Kynafton may play fast and loose at his pleasure. Also the Court agreed, that where two are jointly and severally bound in a bond, a release to one discharges the other; and in such case, if the joint remedy is gone, the feveral is gone too; and that in the case at bar, the joint remedy was lost. But the Chief Justice, who delivered the opinion of the rest, said, they did not determine, that on covenant, where the joint remedy failed, there could not be a feveral remedy.

adly, It was objected to the declaration, that he declares of a deed made between Kynafton of the one part, and Wintersball of the other, and does not say pradict. Wintersball, for want of which he does not appear to be the fame person. This exception was not much heeded. Cases cited pro and con were Yelv. 103. 3 Cro. 913.

Bridgm. 99. Dyer 70. Hard. 178.

3dly, It was objected to the plea, that the notice is not Where a provise faid to be given in an acting week; and though it was goes by way of defeasance of a urged to be by way of proviso, and therefore ought to covenant, it must come on the other fide, (5 Co. 78. 3 Cro. 405. 7 Co. 10. be pleaded on the Poph. 28. Plo. 376. I Leon. pl. 202.) and that the plea wife where by faid he had notice secundum formain & effectium articulorum; way of expla yet Holt, C. J. answered, that where the proviso goes by nation or refericway of defeazance, it must be pleaded by him that takes nant. Vide advantage of it; but this is not so, but alters the sense of 7 Co. 10. the covenant, by explaining and tying up the notice to a particular time, which would not have been understood on the general covenant, by which means it becomes a part of the covenant, so that you must plead accordingly; and, secundum formam & effectum articulorum is only matter of conclusion, which cannot serve without premises. And, upon this fingle point (a), judgment was given for the plaintiff.

(a) Quare? for by the report in with the plaintiff on the first point; et Ld. Raym. and come semble by this wide infra. report, the opinion of the Court was

#### Lacy versus Kynaston.

[Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 688. S. C.]

contain proper words of defea-Vide 214, 215, &c. Comb. 123. 3 Cro. 352.

Defeasance must THE plaintiff brought covenant as administrator to Lacy, and declared on the same indenture in the case before between Kelligrew and Kynaston, and they ex una 9 Co. 52. 3 Let. parte, and Lacy ex altera parte, reciting former articles, and 275. 1 Show, they hereby covenant jointly and severally with Lacy, that if he be minded to leave acting, and gives three months Anie 573. S. C. notice thereof to the company, he shall be paid 6 s. 3 d. per 3 Salk. 298. Cas. day for his life, and that within three months after his 415, 548. Holt death his executors shall be paid 100%. And that if he die 178, 218. I Role without such notice, his executors shall be paid 100%. 939. I Show. within fix months after his death, in the nonpayment whereof the breach was affigned. The defendant craved over, and pleaded another deed made the same day and year, whereby Lacy and others covenant jointly and feverally with the defendant, that if he left off acting, and gave notice, he should be freed and indemnified of and from the faid covenant, and avers he left off and gave notice, and became discharged, and so prayed judgment of the action. The plaintiff demurs, &c. And the question was, Whether this was a covenant or a deseazance? And the Court held,

3 T.ev. 275. 2 14, 215, &c. Bond from A. and B. to Ha covenant from is not a defea-

1st, That this covenant in its nature was not a defeazi Show. 46,47, ance, because it wanted words of deseazance, viz. that the thing be void.

2dly, If A. and B. are jointly and severally bound to H., and H. covenants with A. that he will not fue A., this is not a defeazance, for still there is a remedy on the bond H. not to see A., against B.; otherwise if A. only had been bound, for then fuch covenant excludes him from any remedy for ever, to s. C. ante 573. avoid circuity of action. Vide 43 Aff. pl. 44. This difference being applied to the principal case rules it, and it is but reasonable; because to construe this to be or enure as a release or deseazance, is to discharge all; otherwise of a covenant. 34 H. 8. Br. Estranger al fait. 21 Lit. fect. 376. Inft. 232. Hob. 65.

..... Poft 5-5. Com. Rel. E. 3.

### Topham versus Tollier.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 786. S. C.]

Peleals of all demands to the per-final estate of the antiple antiple and pleaded a release, whereby the plaintiff recisions interlate, releases there were several controversies between the desendant not a bond be- and him about a legacy, and the right of administration, releases scleafes to the defendant all his right, title, interest, and fore judgment demand of, in, and to the personal estate of the intestate. and execution. Upon demurrer this was held no plea; for, per Holt, C. J. cont. Vide there is a difference between a release of all demands to 10 Co. 48 to 52 the person of the administrator, \* as in Yelv. 214., and to Cro. El. 897. the personal estate, as in this case; for the bond is not any Lurw. 249, 250 right or demand to the personal estate till judgment and 1 Lev. 99, 272. execution fued out.

Holt 621. S. C. 2 Lev. \$10.

Post 578. 2 Cro. 170, 222. Yelv. 156. 3 Lev. 274. Show. 150. Carth. 119.

# Remainder.

Vide post Revery fion, page 500.

# Corbet versus Tichborn.

[Pasch. 6 W. & M. B. R.]

F JECTMENT, and trial at bar; the case was, J. S. Attainder, vide was tenant for life, remainder to his wife for life, re- post 630. mainder to his first, second, &c. sons in tail, remainder to the right heirs of J. S. The faid J. S. commits treason, and then has a fon, and then is attainted; and the Court held, that whether the fon was born before or after the at- Vide Feature's tainder, the contingent remainder to him was not dif- C. R. 426, charged by the vesting in the Crown during the life of (209.) 7. S., because of the wife's estate, which is sufficient to support it.

Thompson versus Leach.

Ante 427, 56%

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45. 284. 3.1 S. C.]

A Devise was to Simon Leach for life, remainder to his Surrender of first, second, and third sons, &c., remainder to Sir tenant for life Simon Leach in tail, the remainder to the right heirs of pos to a remain. Simon Leach: Simon Leach the tenant for life furrendered der man is void, his estate by deed to Sir Simon Leach, and after that had and cannot bar a fon born and died, and the son brought an ejectment mainder. Right against Sir Simon, and Simon his father was found to be of eatry will supmon compos at the time of ithe surrender. Et per Cur. tak. port contingent
mander, right ing the furrender to be voidable only, it was held, that of action not the plaintiff could have no title; for his estate in remain- 1 Vent. 306.

2 Rol. Rep. 177. der was a contingent remainder, and if the precedent Eq. Ab. 178. P. 3. S. C. 3 D. 364. p. 13. 9 Salk. 300. 3 Show. 296. 3 Mod. 296, 301. 3 Lev. 284. 2 Vent. 198. Comb. 438, 468. Carth. 211,250, 435. Holt 357, 623,665. Cafes B. R. 475. 1 Co. Arches's Case. z Saund. 382, 383. I Vent. 389. 3 Mod. 301. 2 Vent. Je\$ to 208. 3 Shew. 296. 31 Co. 80 3 Keb. 177. 2 Jo. 2, 77. 3 Keb. 178, 244. F. C. R. 577]

estate was gone and determined by the surrender, the contingency could not arise. There must be a particular estate actually in being (a), or a present right of entry, [vide Bigot and Smith's case, Cro. Car.] And it is not enough that there be \* a right of action, but it must be a right of entry. And they held, that it was not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant. I Cro. 102. 2 Saund. 387. 3 Keb. 2. And if this had been done in the life of the furrenderer by inquisition, that would have preferved the contingent remainder; but that cannot be done now, because the particular estate is determined. To shew this, Holt, C. J. said,

If there be tenant for life, with a contingent remainder to H., and tenant for life is diffeifed, and after that a difcent cast, and five years expire, now the contingent remainder is gone, for there is nothing now to support it, the right of entry being turned into a right of action: But before the discent the right of entry was sufficient.

But they held the furrender in this case to be merely void, so that the particular estate remained in him, notwithstanding the surrender, and the contingent remainder rightly vested (b).

If there be tenant for life with a contingent remainder. and he makes a feoffment in fee upon condition, and the contingency happens before the condition broken, the contingent remainder is destroyed; for there must be a particular estate, or a present right of entry when the contin-

That right of entry must be prefent.

(a) The following distinction is taken by Mr. Fearms, concerning the union of the particular estate with the next vested remainder. If it is by immediate descent from the person by whose will the particular estate and contingent remainders are limited, the particular estate is not merged, or the contingent remainder destroyed; but, if the descent is mediate, it is otherwile.

The same distinction is taken between the cases where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the fame conveyance, and those cases where the accession of the inheritance is by a conveyance, accident, or circumftance distinct from that conveyance which created the particular estate; page 503 (266) to 508 (271).

A contingent remainder in a copyhold is destroyed by the expiration of the particular effate before the contingency happens; but not by the surrender or forfeiture of the particular tenant; Gilb. Ten. 249. Fearne 471. (245.); or a conveyance to him of the estate in remainder, 2 Vern. 243.

It feems that, in those cases where the legal estate is devised to and vested in truffees in truft, there is no necessity for any preceding particular estate of freehold to support contingent limitations; Fearne 449. (230.) Talb. 44, 145. 1 Vex. 208. 1 dik.

(b) On the authority of this case, Les, Ch. Just. in Tates v. Boen, Str. 1104., permitted lunacy to be given in evidence on non eft factum, and the plaintiff on the evidence became non-

gency

gency happens; but if tenant for life enters for breach before the contingency happens, the contingent remainder is revived (a), and may vest (b).

(a) In Bacon's Abridgment, vol. 4. pa. 315., a different opinion is delivered; because the feoffment, though upon condition, was a forfeiture and determination of the particular effate, and the recovery does not purge the forfeiture. But Mr. Fearne infers, from the authority of Co. Lit. 202. b. 1 Rol. Abr. 474. pl. 4. [5 Vin. Abr. 317.] where it is held, at that the estate is reduced, but the forfeiture not purged," that the opinion here expressed is agreeable to law.

(b) Judgment affirmed, Sho. P. C.

### Weeks versus Peach.

[Mich. 13 Will. 3. B. R.]

H. Devised out of his lands a rent to one for life, with Remainder may remainder over, &c. And Shower objected, that be of a rent de novo. Vide there could not be a remainder of a rent de novo; for there anne 466. ILev. cannot be a remainder where there cannot be a reversion. 144. Q. Chan. But, per Hole, C. J. there may be a remainder of a rent 1 Cas. 79, 80.

But, per Hole, C. J. there may be a remainder of a rent 1 Sid. 285. de novo; for the intent of the party gives it first a being 6 Mod. 112. for the whole, and then the leffer estates are carved out of 1 Mod. 218. it. Vide 2 Lutw. 1225.

2 Lev. 80, 88. 2 Keb. 89. Co. Lit. 298. a. Butl. note 2. 3 P. Wms. 230.

Rents.

240. 3 Lev. 39, 150, 233, 295.

#### Stephens & Ux. versus Snow.

[Hill. 2 W. & M. B. R.]

THE plaintiff declared upon a lease for years, reddend. Growing reatmet 30 s. at Lady-day and Michaelmas, and affigns for released by release breach non-payment of a year's rent, due and ending at Vide ante 575.

Lady-day 1689. The defendant pleaded a release dated pl. 4. 10 Co. 48 the 18th day of November 1688, of all demands; and, 100, 2 Ler. 210. upon demurrer, judgment was given for the plaintiff; for 1 Ven. 314. the growing rent not due, which is incident to the rever- 1 Sid. 141. fion, was not discharged; though the nrn man year and 195.
which was a duty demandable, was released; but here the 1 Mod. 95.
release 2 Cro. 486.
Co. Lie. 292. b.

#### Repleader.

release being pleaded as a bar to all, which it is not, the: plea is naught, and judgment must be given for the plaintiff.

# Lord Rockingham & al. contra Oxenden

[Coram Trevor, Mafter of the Rolls, 1711.]

; Will. Rep. 177. S. C. by the name verius Penrice. Cro. Jac. 310. Cited and approved, 4 T. R. 173. Vi. fat. 11 G. 2. **ch.** 19.

THE leffor dies upon Michaelmas-day, between three and four in the afternoon, before fun-fet, the rent being referved payable on Michaelmas-day. The question was, Whether the executor or the heir, or, which is the fame, the jointuress of the lessor should have this rent? The executor infifted that this was the rent-day; that it might have been paid in the morning, and that a release upon fuch payment had been a discharge; and they denied the opinion of Hale in 1 Saund. 287., and faid, that so it was held by the judges of affize at Durbam, wiz. Baron Bury, &c. But on the other fide it was argued and decreed, that the rent should go to the heir or jointuress, because at the time of the death of the lessor, there was no remedy nor means to compel the payment thereof. Vide 10 Co. Clun's case. 2 Bulft. 293. Plowd. 172, 173. 1 Inft. 202. 1 Keb. 59. 1 Sid. 162. 2 Cro. Pox versus Whichest.

[ 579 ] Vide Cro. El. 328,883. 3 Ca. Lat. 248.

Repleader.

S. C. Ante 216, 373.

Staple versus Hayden.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 922. S. C.]

zble, error. 6 Mod. 2, 102.

6 Mod. 1, 2, 3. T was laid down by the Court in the case of Staple and 3 Salk. 121. Holt Haydon, Trin. 2 Ann. B. R., which see, title Default, 217. Repleader p. 216., first, That at common law a repleader was allowed foretrial. 1 Lev. before trial, because a verdict did not cure an immaterial 32. 2 Lev. 12, iffue: But now a repleader ought never to be allowed beaid were grant. fore trial, because the fault of the issue may be helped by the trial by the statute of jeofails.

adly, That if a repleader be denied where it should be Parties begin de novo at the first granted, or granted where it should be denied, it is error. fault. 1 Mod. 2. 3dly, That the judgment of repleader is general, viz.

quod partes replacitent; and the parties must begin again at

the first fault, which occasioned the immaterial issue: That if the declaration be ill, the bar ill, and the replication ill, the parties must begin de novo; but if the bar be good and the replication ill, at the replication. 3 *Keb*. 664.

4thly, No costs are allowed on either side (a). 5thly, That a repleader cannot be awarded after a de- after default. fault.

No cofts. Not 6 Mod. 2, 3.

1 Keb. 23, 39, 89, 90. 3 Lev. 20, 440. Dyer 117, 118. 2 Saund 318, 319. 1 Salk. 173.

See the form of a Repleader. Lutw. 1622.

(a) Vide 1 Bur. 202.

## Replevin and Homine Replegis [580] ando.

[Vide title Avorory.]

Vide I Lev. 90. Raym. 33, 34, 255,&c. 6 Mcd. 68, 81, 103, 158, 189.

#### Halet versus Burt.

1 Ld. Raym. 218. S. C. with other [Hill. 8 Will. 3. B. R. points.]

IN trespass for taking, &c. The defendant justified that Bailist of a hunthe place where was a hundred, and time out of mind replevins out of had a court of all actions, replevins, &c., grantable in or court. 5 Mod. out of court, and that a replevin was granted to him by 252. S. C. the bailiff out of court, virtute, &c. It was questioned, Infi. 145. Whether a hundred-court could prescribe to hold plea of a Inft. 139. replevins, because the county-court could not hold plea of Co. Ent. 284-them at common law, but were enabled by the statute, F. N. B. 73. which extends not to the hundred-court. But per tot. Cur. Skin. 674. clearly, Supposing they may grant them in court, yet they 3 Salk. 272. Cases B. R. 120. cannot prescribe to grant them out of court.

Ante 394.

#### Richards versus Cornforth.

[Mich. 9 Will, 3. B. R. 1 Ld. Raym. 255. S. C. Comyas 42. S. C.]

**b**t be ared before judgment, by abating the 133, 208. Cowp. 781. 5 T. R. 248.

Average for rent, RROR of a judgment in replevin, wherein the de-where part is not fendant avowed for rent and had judgment; and now Mr. Carthew affigned for error, that part of the rent became due after the diftress taken, for the diftress was made the 26th day of September, 7 W. 3., which was three wiry as to that, days before Michaelmas; whereas the defendant had Vide Cro. Jac. avowed for that Michaelmas rent. Et per Cur. This is 473. S. C. 5 Mod. 363. called Ricards i. c. that he shall have the distress as a pledge till all the versus Comforth. rent avowed for be paid, and that was more than was due Moor 251. Hob. at the time of the distress. In this case the avowant before judgment should have abated his avowry quoad the Michaelmas rent, and taken judgment for the rest; but the defendant getting his avowry mended in C. B., the roll was amended here in B. R., and so the error was cured.

#### [ 581 ]

### Moor versus Watts.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 613. S. C. Vide Skin. 61.]

ando. See 2 Show. 218, 221 to 232. 6 Mod. 84. Lit. Rep. 54. 3 Leon. Caf. 323. Farefl. 9. S. C. Cales Ent. 293.

Homine repleti- TPON a babeas corpus it was returned, that Watts was in custody by virtue of a capias in withernam; and the case was, That upon a bomine replegiando the sheriff returned an inquisition, finding that the party was eloigned, whereupon a withernam issued, returnable catab. Martini, which was not yet come; but the defendant was taken thereupon and moved to be bailed, and the matter was B. R. 423.

Hok 626. Lilly four times moved and debated. It was objected, that he could not be bailed upon the withernam, for it was an execution, and he had no day in court, and the plaintiff could not have a new withernam: And the Lord Gray coming into court upon an elongata found, was committed and lay by a fortnight: Also they cited Raymond 474., and said the return of the elongata was a kind of conviction, and the defendant thereby estopped from pleading non cepit. That which seemed to be the sense of the Chief Justice, to which the rest agreed, was,

The theriff cannot return they were not taken.

1st, That a bomine replegiando does not differ from a common replevin de averiis; and that in a replevin for cattle, the sheriff must either return a deliberari feci, or an excuse thereof, viz. that no body came to shew him the cattle, or elongata; but he cannot return they were not taken.

taken, for that goes to the point of the writ which the defendant is to falfify, and not the theriff; that therefore the sheriff must return an elongata where he cannot make a deliverance, and the defendant is not concluded by the re- After elongata turn of the elongata to plead non cepit, because it was neces- withernam fary, and he could not avoid it: And as for this reason no awarded, the action lies against the sheriff for a false return of an defendant may elongata, where he cannot make deliverance; so the deSee 2 Show, ut fendant is not concluded to plead non-cepit to the action, supra. Fared, sy. because he cannot falsify the return.

2dly, That the capias in withernam does not alter the case, nor make it the stronger, because it is the mere consequence of the return of the dongata; therefore he is no more estopped by the withernam than he was by the elongata to plead non cepit, or to claim property if it were

a common replevin de averiis.

3dly, That in replevin de averiis after an elongata and Upon pleading withernam, if the defendant pleads non cepit, he shall have claiming prohis cattle again, and even a capias in withernam against the perty, the d plaintiff for them; so it is if the defendant claims a pro-perty. Since the taking or property is in question, the again. So in law deems it reasonable that the desendant should have his homine replegigoods again during the dispute. And by the same reason ando he shall be bailed on non in a homine replegiando, \* the defendant, upon pleading non cepit. cepit, should be restored to his liberty; and the Court de- \* nied the withernam to be an execution, for that cannot be before judgment, and held it only to be a mesne process: Also they disliked the case in Raymond, and the case of the Withernam is lord Gray, but affirmed the case in the Reg. 79. a. and Vide 2 Show. thought it made for them, and that upon non cepit pleaded, 218, &c. 6 Mod. he might be bailed. Keil. 71. a. F. N. B. 74. were cited. 84. Fared. 17. Adding this farther reason, that hereby the supposal of the writ is denied and balanced, and the matter stands indifferent, according to the rule of bailing laid down by my lord Coke, upon West. 1. c. 15.

4thly, The Court held, that there might be a new There may be a withernam, but observed it was not necessary nor material after the defendto determine that in this case; for the bail must be in a ant has be fum certain, with condition that he appear de die in diem ; bailed upon the and if judgment against him, that he render his body in withernam ibidem remansurus quousq; he render the party, and permit him to go at large; therefore if he be rendered again, he is in custody upon the withernam, as before. So if H. brings an audita querela, and is bailed, and judgment is against him, when H. is rendered back, he is in custody again upon the first execution; and so in an appeal of murder, if the defendant be bailed and makes default, process shall go against the bail, and also a capias against him; but if he render, he is in custody upon the

If on elongata neturned the defendant pleads non cepit, no withernam shall iffue. Vide 6 Mod. 84. Lit Rep. 54. 3 Leon. Cal. 323.

appeal. Yet note: Upon his default a new copies les against him. So in this case, if before the withernam the defendant had pleaded non cepit, that had stopped the evithernam; but if that had been found against him, the impediment was removed, and a withernam should have gone; so here, if after the withernam he plead non cepit, which is found against him, and he is not rendered, a capias in withernam lies against him, as well as process against his bail; for there is nothing to hinder it. Vide 8 H. 4. 2. T. Mainprize 23.

The plaintiff's counsel seeing that by the opinion of the Court the defendant could not be bailed, unless he pleaded non cepit, would not deliver a declaration; which the Court faid was putting a difficulty upon them; and upon this, in order to nonfuit the plaintiff, the question was, Whether the plaintiff was demandable upon the withernam? Also there was a former question, Whether he might be bailed upon the habeas corpus before the return of the

withernam?

In homine replegiando, defendant cannot be bailed before the return of the withernam. See 2 Show. 218 to 232. [583]

As to the last point the Court held, that before the return of the withernam the defendant could not be bailed; and so it is of an appeal of murder, the defendant ought not to be bailed before the return of the writ; and though this has been done in an appeal by some judges, yet per Holt, C. J. It was done minus rite; he would not therefore allow bail before the return of the withernam, and faid, that in a homine replegiando after an elongata returned, if the defendant comes in gratis, and pleads non cepit, he shall not be put to final bail; (ratio videtur esse, because hereby the withernam is estopped or suspended;) but if he comes in custody upon a capias in withernam, he must give bail, and cannot be admitted to that till he call for a declaration, and plead non cepit.

Plaintiff is deseturn of the withernam, and

As to the other point, the Chief Justice said, that whenmandable on the ever a writ is awarded, which is returnable, the retorn day is a day to both parties to appear, and though the may be nonsuited writ be returned not served, the desendant may appear to for not appearing. prevent any ill consequence: As to prevent a capias, 5 E. 4. 69. So here to fave himself on a withernam. Respond. 57. 7 E. 4. 5. Upon a distringus proximus villus, &c. the defendants have no day, yet they may appear and traverse. In a common replevin the original gives no day, for that is vicentiel; so is the alias, but the pluries is returnable here; and though there is no summons nor attachment in the writ, yet the day of the return is a day to the parties, and the entry is, that the defendant attachiatus est ad respondend. de pl'ito quare cepit, &c. And the reason is, because though in truth there was not actually an attachment, yet virtually and in consequence of law it is fo, he being bound to appear upon the peril of a wither-

nam.

nam. And though the plaintiff be absent, he may make an attorney. Hereupon he was called and honfuited, for otherwise the defendant might lose his liberty for ever by such a contrivance.

#### Horn versus Lewin.

[Hill. 12 Will. 3. B.R. 1 Ld. Raym. 639. S.C. Fortescue 233.

N replevin the defendant made conusance for 100 l. de In a plea in bar redditu onerat. in aretro pro uno anno. The plaintiff as of tender of to 50 l. pleads de injuria fua propria absque boc quod fuit in the money ought aretro, and as to the other 50 l. that he was ready on the hot to be brought land till sun-set, and none came to receive it, and that into court. S.C. he is still ready to pay it, and brings the money into 3 Salk. 273, 344, 356. Cases court. Defendant demurs specially to the first plea, quia B. R. 353. attingit ad generalem exitum. And as to the other 50 l. he Vide polt 596, takes it out of court, & pro dampnis dicit quod non obtulit, 597. Raym. &c. and upon this the plaintiff demurred.

The case being several times spoken to, it was held,

1st, That de injuria sua propria absq; hoc, &c. was an impertinent round about way of pleading the general tro; amounts to iffue, and that it amounted to no more than the general the general iffue. issue, riens in arrere, and consequently was ill upon a special demurrer: Also this traverse put the defendant to an unnecessary replication; therefore as to the 50% it was clear for the defendant.

2dly, As to the other 50% the Court held, 1st, That the bare paratus was not sufficient, and did not amount to a tender without an obtulit, and therefore his being ready on the land, fince he did not tender the rent, did not oblige the grantee to demand the rent before he made Vide 3 Lev. distress. Hob. 207. I Ven. 322. And so the distress was 104, 105 lawful without a demand, and then the avowry or conufance of the defendant stands unanswered. 2dly, The profert of the money was impertinent and idle. Keil. 20. Dy-227. 2 E. 4. 25. Pl. 15. 2 Cro. 126. In debt upon a bond, there might be a profert, to fave damages; because there the money is the thing in demand. But it cannot be in an avowry to a replevin, because the avowry is to justify the taking the cattle; and whether the money is paid or not, is not the question; but if the distress was rightfully taken, the avowant must have a return; if wrongfully, he must answer the plaintiff's damages. If Vide H. Bl. 24 then the profert was superfluous, so was the avowant's accepting it, and judgment must be given for the avowant on the avowry, by which it appears that rent was behind, and the distress lawful, and to which there is no sufficient anfwer.

34. 1. Vent. 222. De injuria fua abiq. hoc quod fuit in are-

[584]

#### Pratt versus Rutlith.

fTrin. 13 Will. 3. B. R. Vide this case, title Avewry, pl. 6. page 95.]

F property claimed in replevin, 6 Mod. 69, 81, 139, 140. 1 Lev. 90. Lutw. 1316.

[ 58; ] Vide 1 Lev. 68, 85, 289. 2 Lev. 198. 3 Lev. 363, 366. S.C. 6 Mod. 277, 259. 3 Salk. 369. Hok 68.

# Request.

Fitz-Hugh versus Dennington.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1094. S. C.]

of feven years upon request ;

Condition to do DEBT on a bond, with condition, reciting, that the plaintiff was apprentice to the defendant for feven years; and that if the defendant at the end of seven years request must be Should procure him to be made free of the joiners' company (if made on the last made on the last requested) then the bond to be word. The defendant pleaded, 68, 85. Pal. 321. that at the end of seven years or afterwards bucusq; he was Fareil. 143, 144. not requested. The Court held a request necessary, for Akyn 25. Sty. the condition was to do a collateral thing; and as it is 66. 1 Cro. 179, part of the condition it must be averred. And here a re-280. 2 Cro. 183, quest within the seven years, when the thing was not to 652. 6 Mod. quell within the level years, when the thing was not to 200, 227, 260. be done, shall not be intended per Cur. Afterwards this was moved again by Broderick, who urged, that the de-1 Rol. Rep. 374 fendant should have pleaded he was not requested gene-Moor 241.

1 Leon. 63, 69, rally, and that the request might have been before the end of the seven years. Et per Cur. It is not to be done post finem, but ad finem, and the end of a thing is always part of that of which it is the end, and he was to be made free the last day of the seven years, and should have requested some convenient time in that day, that the other might have a reasonable time to do it in. Adjudged on a writ of error of a judgment in the Marshal's Court for the plaintiff, and the judgment reversed, per totam Curiam.

# Rescue.

Ste Cro. Car. 109. Cro. Jac. 345, 486. 2 Hawk. P. C. 139, &c.

#### Dominus Rex versus Belt.

[Mich. 8 Will. 3. B. R.]

N the case of a rescue there are two ways of proceed- Where the rescue ing: If the rescous is returned to the philazer, and charged upon process of outlawry issues, and the rescuer is brought into affidavits. court, he shall not be discharged upon affidavits; but pl. 3. infra. where upon the return of a rescue an attachment is granted, and the party examined upon interrogatories, upon anfwering them he shall be discharged.

#### Anonymous.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 589. S. C.]

See Ray. 161. 1 Lev. 214. 2 Lev. 26, 28.

THE sheriff returned virtute brevis mibi direct. feci Return that the warrant. A. & B. ballivis meis qui virtute inde cepe- in custody of the wunt the defendant & in custodin mea habuerunt quousq; theriff, and H. fuch and such rescusserunt him ex custodia ballivorum meorescued him out
of the custody of
rum: And Mr. Eyre moved to quash it, and it was quashed the bailist, ill per Cur. For per Holt, C. J. When the bailiffs have are for repugnancy. rested the party, he is in fact and in truth in their custody; Vide ante 436, but in law, he is in the custody of the sheriff. An answer 1 show. 180. either way is good, viz. that he was rescued out of the Lutw. 130. bailiff's custody, or that he was rescued out of the sheriff's 3 Mod. 211. custody; but to say he was in the custody of the sheriff, and yet rescued out of the custody of the bailists, is repugnant.

### Anonymous.

[Hill. 3 Ann. B. R.]

PON an affidavit of a rescue, an attachment was Attachment soe prayed against the rescuers, and this was a rescue granted upon upon mesne process; but denied; for per Holt, C. J. The offidavits. Vide rescue must be returned upon the writ, and the motion Str. 531. and attachment founded upon that; but it is never the Fine for a rescue. course to grant it upon assidavits.

Sir Samuel Aftry faid, it was the constant course upon Vide Raym. 84. the return of a rescue, to set sour nobles fine upon each 3 Lev. 372. offender, 0 2

offender, and that he had it from Mr. J. Twisden. Hill. 11 Will. 3. B. R. Vide 2 Jo. 198. (a) See 6 Mod. 141., a difference where it is on mesne process, and where on an execution.

Lord Mansfield said, that this seemed in all cases, and under all circumstances, upon the same foot.

(a) In Rex v. Elkins, 4 Bur. 2189., Court in that case fined the desendant 5 l. In Rex v. Alway et al., marg. ibid. to be a strange rule; it puts all rescues, the Court set a fine of only 6s. 8d.

[587]

# Restitution.

### Rex & Regina versus Leaver.

[Trin. 3 W. & M. B. R.]

against any that 2 Lev. 223. 3 Keb. 231. 1 Show. 261. 120.

Writ of restitu-tion lies not against any that

N an indictment of barretry, the defendant was con-vict and fined 100% which was levied by the sheriff, are not parties to and paid into the hands of the collectors; afterwards the the record.

Raym. 85. S. C. judgment was reversed. Pemberton moved for a rule for restitution against the collectors. Holt, C. J. It cannot be, for they are not party to any record here. You ought to sue out a special sci. fa. and make them parties, as in Comb. 47, 58. to the out a special jcs. ja. and make them parties, as in Skin. 3a. Tem. 1 Cro. 328., but this he also doubted, faying, this case differed. He put this case: A recoverer in ejectment is diffeised, or makes a seoffment; afterwards the judgment is reversed: Will a writ of restitution lie? He said it would not, because the diffeisor or feoffee are strangers to the record, which Pemberton agreed. If a feme recover damages and then marries, and the judgment is reversed, restitution lies against her and her husband; but they are parties. And the motion was denied.

Vide 5 Mod. 443, 444.

#### Dominus Rex versus Toslin & al.

[Hill. 10 Will. 3. B. R.]

Restitution denied upon quafhing inquilition leafe for years funding out.

Motion was made for restitution, upon quashing an inquisition of forcible entry; the case was, that the of forcible entry, lessor arrested the lessee for rent, and while he was in custody entered the house under pretence of forseiture by a proviso in the lease; but the motion was denied, be-

cause here appears a title standing out; which he shall not Cro. El. 466. void by finister means, but ought to pursue his remedy by Vide Dalton, ejectment according to law. Otherwise, had no title ap- c. 132 1 Hawk. peared.

#### 3. Domina Regina versus Winter.

[Pasch. 4 Ann. B. R.]

I PON a motion made by Mr. Broderick for a proce- Traverse to indendo in a case of an inquisition taken by justices of quistion of forcipeace, and a forcible detainer found, and a warrant granted perfedess to reftiby them to restore the possession, which was suspended by tution. S. C. a certiorari issued out of this court, it was said by Holt, I Hawk. c. 64. C. J. That if the party against whom the inquisition was s. 60, 62. found could traverse the force, that was always a reason \*[588] to stay restitution; nay, that it had been held a supersedeas to the awarding restitution, and that it was so in Sir Richard Bray's case: There an inquisition found a forcible entry: The defendant offered immediately before the justice to traverse the force, the justice refused the traverse and granted restitution; and Kelynge, C. J. granted rerestitution. He said also, that all inquisitions of office are Rep. Temp. of common right traversable; so is a distringus proximas Hard. 175. villatas, in case of pulling down hedges in the night, on the statute of West. 2. though the statute mentions no such thing. And if in case of an inquisition of forcible entry taken before a justice of peace, the defendant tenders his traverse immediately, the justice must adjourn to another day, and award process to return a jury. Powel, J. said, that in the case in Dyer 122. a traverse of the indictment was held to be a supersedeas only at election, but latterly it had been held an absolute supersedeas: And he said also, that if H. license another to enter into his land and take the profits, it is a lease at will; and if the licence was for a year, it is a lease for a year; otherwise of a licence to hunt. And if H. license another to come upon his dock (which was the principal case), and carry on his trade, it is a lease; because it is all the proper profits of a dock. Note; Trin. 11 W. 3. Rex versus Scarlet, the same question was, viz. Whether re-restitution should be granted, because the justice had refused a traverse to an inquisition of forcible entry? But not resolved. 1 Sid. 287. 2 Keb. 571. Dy. 122. Sty. 359, 360. were cited.

Vide Cro. Jac. 246, 698. Cro. Car. 328. 4. Anonymous.

[Pasch. 4 Ann. B. R.]

Where the money recovered in a judgment appears by record tution fall be without a fcire facias; other-

WHERE the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the to be paid, resti-money is paid, the party shall have restitution without a feire facias, and there is a certainty of what was loft; otherwise where it was levied but not paid; there must then be wise where levied a scire facias, suggesting the matter of fact, viz. the sum any. levied, &c. But where judgment is set aside after execution for irregularity, there needs no scire facias for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution. Per Holt, C. J.

[ 589 ] Vide 4 Leon. Caf. 69, 145, Cro. El. 223. 310. Cro. Car. 13g. Paft 6gg.

# Retorn of Writs.

[Vide title Writs.]

#### Wilson versus Law.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 20. S. C.]

Attach feei
good in a return.

Vide Cro. El. 13.
pl. 7. 4 Mod. clared against him, The defendant prayed ofer of the 287. 2 Roi 459 writ and return; and having eyer, demurred to the writ and return, and to the felony pleaded over, not guilty. Exception was taken, 1st, That the writ commanded the theriff quod attach. Johannem Law, &c., and the theriff had returned attachiari feci. This they pretended was no answer to the writ, the injunction whereof is personal; but the Court held it well enough, for the sheriff was not bound to execute it in person, but might do it by his bai-Dyer 241. 2 Ro. 457. And what the bailiffs do by the sherist's warrant, is done by the sherist, nam qui facit per alium, facit per se. If he had returned attachiatus est, it had been good. Captus est is a good return to a capias, Kitch. 258.; for if there is the substance, it is no matter for form, as 1 H. 6. 6. a scire facias was returned, fire faci A. B., without adding infra nominat.; yet, because it was said to be virtute brevis predict. preut mibi

precipitur, it was adjudged good.

adly, The theriff returned, ita quod corpus ejus paratum Surplefige in rehabe ubicung; and it was objected this was nonfense, and turn rejected. also impossible. Sed per Cur. The return is good without 432, 436, 586. it; it is therefore but surplusage, which will not vitiate a writ or indicament, much less a return, which requires not such preciseness in form. 3 Cro. 893. 2 Ro. 460.

See more of this case, title Appeal, pl. 2. pag. 59

### Palmet versus Price.

[Mich. 7 Will. 3. B. R.]

N action was laid in Staffordsbire, and judgment for Process whereand the plaintiff; he sued out a fieri facias with a testatum to ground testainto Worcestersbire; and now it was moved that this was by the attorney irregular, and ought to be fet aside, because no fieri facias of course. Ante had ever gone into \* Staffordsbire; and the sheriff of Staf- 515. I Barnes fordsbire made affidavit that he never returned any fieri fa- 163. eias in the cause: Sed non allocatur; for the fieri facias upon \* [500] which the testatum is founded, is returned of course by the 3 T. R. 658. attornies themselves, as originals are; if you search the sile you may find one, and that is sufficient.

## Reversion.

Vide ante Remainder, page 576. I Saund. 260, 261. 1 Salk. 231. 3 Lev. 94, 2098 233, 406.

### Abbot versus Burton.

[Trin. 7 Ann. C. B. Comyns 160. S. C.]

& S. being seised in see of certain lands descended to H. seised of lands J. being seised in see of certain lands descended to re-interest materna, him a parte materna, covenants to levy a fine thereof a parte materna, limits several limits several to A. and B. to the use of them and their heirs, to the in- estates with retent that a common recovery should be suffered against the mainder to the faid conusees to the use of J. S. for life, remainder to his use of his right wife for life, remainder to his first, second, and third sons a parte materna in tail, &c., remainder to the right heirs of J. S. The thail have it, fine is accordingly levied, and then the common recovery being the ancient use. 2 Mod. is suffered against the conuses of the fine, as tenants to 286. 1 Co. 105. the pracipe with voucher of J. S. Afterwards J. S. and Cro. Car. 161. his wife die without iffue, and the lesior of the plaintiff 2 Lev. 60, 79.

Rep. A. Q. 181. Show. 92. 1 Inft. 73.

No difference between express and implied use. Post 675, 676.

[591]

Vide ante 567, \$70.

840,772. S. C. is heir of J. S. a parte materna, and the defendant heirgeneral. This matter being found upon a special verdict in ejectment, the question was, Whether this limitation of the remainder to the use of the right heirs of J. S. did create a new estate descendible to the heirs-general, or was only the ancient use? And the resolution of the Court delivered by Trever, C. J. was for the plaintiff, that it was the encient use, and that there was no difference when upon the conveyance of an estate any part of the use refults by implication of law, and when it is referred by express declaration to the party from whom the estate moved; for there is no reason that a greater alteration should be wrought in a use which a man by express and plain words referves to himself upon a conveyance of his estate, than when the law makes a construction of this intent to referve it, not from express words, but from other circumstances and presumptions, which in the consideration of law do as strongly and manifestly declare his mind: And for this was cited the case of Godbolt and Freestone, 3 Lev. 406.

But the difference whereby that case was endeavoured to be distinguished from the case in question was this: That was upon a feoffment to the use of the feoffor for life, remainder to his first, second, and other sons in tail, remainder to the right heirs of the feoffor; and adjudged, that this remainder was to the heirs of the feoffor a parte materna, according to the ancient estate and use which the feoffor had before the feoffment: And the reason was, because this remainder of the use did arise out of the estates which immediately moved from the feoffor, and was no more than what the law would have referred, if no use at all had been declared of the remainder. But in the prefent case, the use limited in remainder to the right heirs of 7. S. does not arise out of an estate that moved immediately by that conveyance from J. S., but out of the estate of the conusees, who were seised in see both of the estate and use by the fine, and did by the common recovery convey over that estate, out of which all the new uses and the remainder in question arose. To this the Chief Justice faid, that the fine and common recovery were both to be taken as one entire conveyance (a), confisting of these several parts, and directed as to the use of them by the same covenants. That though the conusees had a seisin in fee of the estate and use vested in them by the fine for a special purpose, and upon that seisin the common recovery was had, and in strictness the estate passed by it was her estate; yet upon consideration of the whole conveyance the estate did originally move from J. S. who was the co-

(a) Vide Cro. Jac. 643. 2 Burr. 1134. 4 Burr. 1952.

nufor"

nufor of the fine; and for that reason, if there had been no limitation at all of this remainder of the use upon this recovery, he took it to be very clear, that so much as remained unlimited should result to the conusor and his heirs, and not to the conusee, in whom the estate was not vested with a purpose to create him any interest, but in order to forward and complete the conveyance of the conusor's estate, which was taken as one conveyance; then does the use limited upon the common recovery as properly arise out of the estate that moved from the conusor of the fine, as if he had made a feoffment or fine, or any fingle conveyance to that use. Judgment for the plaintiff (a).

Note: Estates-tail cannot be barred where the reversion is in the Crown. Raym. 358.

(a) Vide Doe ex dem. Crow v. Baldwere, 5 T. R. 104. Note to Price v. Langford, ante 337.

## Repocation.

[ **592** ] a Lev. 149. Cro. Jac. 497. 3 Lev. 213.

## Hitchins versus Basset.

[Trin. 5 W. & M. B. R.]

N ejectment, the jury found a special verdich: That Sir Special verdich H. Killigrew being seised in see, made his will, and finding a will of lands, and that devised his lands to B. for life, remainder to C. in see; afterwards the they find likewise that Sir H. Killigrew made blind testa- testato: made mentum in writing; but what were the contents of that aliud testament. imports not a rewill they do not know: The question was, if the first will vocation. 1 Co. was revoked? Finch argued, that every later will is not a 112, and 174. revocation, for a man by one will may dispose of one acre, of the second and by another will of another acre: So if a man purchase 2 D. 528. p. 7. lands after he has made his will, he need not make his 3 Mod. 203. will over again, but make another will as to these. Vide 1 Show. 537. Cro. Car. 293. Therefore this other will might be of other lands, and no revocation, and the aliud teflamentum might be no revocation, but might be confistent. Cre. Eliz. 721. Cro. Car. 24. Levinz contra argued, that revocations are favoured, because they are in the nature of restitution to the heir, and all restitutions are favoured, Vide Dyer 310. Moor 429. 1 Roll 614. A deed of feoffment without livery, a bargain and (ale without inrolment, Vol. II.

a grant of a reversion without attornment will revoke a will, and yet these are void acts; but the reason is, that it appears now it was not the testator's intent that it should remain his will, the first will must be supposed to be perfect and include all; and if a man claims by devise, he must in pleading say, that the testator by his last will devised, &c. 44 Ass. 36. 2 Ric. 2. 3. b. But the Court were of opinion, that it was no revocation, and the aliud testamentum might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the House of Lords. Vide Hard. 374. Parl. Cases 146. (a)

(a) In the case of Goodright ex dem. Rolfe v. Harwood, 3 Wilf. 497. it was found by special verdict, that the testator made and duly published another will, the disposition whereof was different from the disposition in the former, but in what particulars was unknown. The Court of C. B. held, that the first will was revoked; but the judgment was reversed in B. R. Cowp. 86., and the judgment of reversal affirmed in the House of Lords, 7 Bro. P. C. 344. Mr. Powell observes, that if the jury find expressly, that the disposition made by the second will is inconfiftent with the devices contained in the former, that appears to be a sufficient ground to decide the latter a revocation, Esjay on Devises, 541. Wherever there is an alteration in the legal or equitable estate of the devisor, a will is revoked, Burgoigne v. Fox, 1 Atk. 576. Bennett v. Wade, 2 Atk. 325. Darley v. Darley, 3 Wilf. 6. 7 Bro. P. C. 177. Ld. Lincoln's Case, Sho. P. C. 154. Eq. Ab. 411. 2 Freem. 202. Pollen v. Huband, Eq. Ab. 412. Sparrow v. Hardcastle, 3 Aik. 799 Amb. 224 Difter v. Difter, 3 Lev. 108. Marweed v. Turner, 3 Wms. 163. Lutwich v. Mytton, 1 Rol. Ab. 614. Hick v. Mors, Amb. 215 Vide Parsons v. Freeman, 3 Atk. 741. Rider v. Wager, 2 P. Wms. 329. Cotter v. Layer, id. 624. Where a will is made between the making tenant to a pracipe and fusiering a recovery thereon, or between the surrender and admittance to a copyhold, it is good, as the subsequent acts relate to the prior, Sel-

Rep. 251. Roe ex dem. Roden v. Griffiths, 4 Bur. 1952. 1 Bl. 605. A conveyance of the legal estate from one trustee, &c. to another, is not a revocation, Doe ex dem. Gibbons v. Potts, Doug. 710. Nor in equity, a conveyance of the legal estate to the devisor having a prior equitable interest, Watts v. Fullarton, cited ibid. W'illett v. Sandford, 1 Vez. 178, 186. A mortgage in equity is only held a revocation pre tanto, Rider v. Wager, 2 Wms. 616. Vide Powell 566. for other cases relative to this subject. In Swist ex dem. Neale v. Roberts, 3 Bur. 1491. Lord Mansfield said, constructive revocations, contrary to the intention of the testator, ought not to be indulged, and fome everstrained resolutions of that sort had brought a scandal upon the law. In Roe ex dem. Noden v. Griffiths, 4 Bur. 1960. he expressed an opinion nearly similar; and in Doe v. Pott, Doug. 721. he faid, all revocations which are not agreeable to the intention of the testator, are founded upon artificial and abfurd reafoning. The absurdity of Lord Lincoln's case is shocking; however, it is now law.

In Eccleston v. Speke, Carib. 79.

Lutwich v. Mytton, 1 Rol. Ab. 614.

Hick v. Mors, Amb. 215. Vide Parfons v. Freeman, 3 Atk. 741. Rider v.

Wags, 2 P. Wms. 329. Cotter v. Layer, id. 624. Where a will is made between the making tenant to a pracipe and suffering a recovery thereon, or between the surrender and admittance to a copyhold, it is good, as the subscipant acts relate to the prior, Seluyn, 2 Bur. 1131. 1 Bl.

Tyrer, 1 P. Wms. 343. Prec Ch. 59.

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Tyrer, 1 P. Wms. 343. Prec Ch. 59.

2 Vars. 741. Gilb. Rep. Eq. 130. where, in addition to the circumstances last mentioned, the first will was cancelled by order of the testator, it was held not to be revoked; the cancelling being upon a presumption that the later will was good and duly executed. In Goodright ex dem. Glaxier v. Glaxier, 4 Bur. 2512. it was ruled that a first will, remaining in the testator's possession uncancelled, was not revoked by a second, which was cancelled by the testator. In Burtonsbaw v. Gilbert, Cowp. 49. where the testator executed a will, and a duplicate which he depo-

fited in the hands of another person. and afterwards made another will, the second will, and that part of the first which he retained in his own possession, were at his death together cancelled, and the part which he deposited with the third person, had, at his request. been returned, and was in his possession uncancelled; the first will ruled to be revoked: The Court agreed that cancelling was an equivocal act, and in order to make it a revocation it must be proved que anime it was done. Vide Bibb ex dem. Mole v. Thomas, 2 Bl. Rep. 1043.

#### Lugg versus Lugg.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 441. S. C.]

BEFORE a Commission of Delegates. One being Will of personal fingle, made his will, and devised all his personal estate presumed estate to J. S. afterwards he married and had several chil- alteration of cirdren, and died without other will or disposition, and now cumstances. coram Delegatis, of which \* Treby, C. J. was one, it was Vide I Saik. 257. S. C. Cases ruled, that there being such an alteration in his estate, B. R. 236. and circumstances so different at the time of his death Vide 2 Sho. 242. from what they were when he made the will, here was room and prefumptive evidence to believe a revocation, and that the testator continued not of the same mind (a).

For Revocation of Uses, &c. Vide 1 Co. 112, 173, 174. 6 Co. 33, 34. 10 Co. 86, 143. Cro. Car. 472. Chan. Caf. 242. 2 Lev. 149.

(a) The rule in this case has been confirmed by many subsequent decisions, and the courts of common law having adopted the principle from those of civil law, the cases decided in either of those courts are reciprocally considered as authority in the others.

The doctrine of revocation of a will by the alteration of circumstances, is established to extend to devises of lands by Brown v. Thompson, I Eq. Ca. Ab. 413. Christopher v. Christopher, 4 Bur. 2171. n. 2182. Sprang v. Stone, Ambl. 721. Dee ex dem. Lancasbire v. Lancasbire, 5 T. R. 49. In the last case the rule was extended to the birth of a poshumous child, and the Court were of opinion that the principle is pot so much an intention to alter the

will, arising from the circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party does not then intend that it should take effect, if there should be a total change in the fituation of his family.

The marriage and birth of a child, must be both subsequent to the making the will, in order to produce a revocation, Shepherd v. Shepherd, 5 T. R. 51. n. Ward v. Philips, cited ibid. Getson v. Wells, cited Ambler 490. Vide Wellington v. Wellington, 4 Bur. 2165. Jackson v. Hurlock, Amb. 487.

In Thompson and Shepberd, Ambler 490, in marg. marriage and having children were held not a revocation of a will made by a widower who by a former wife hall children, Eving at the time he made his will.

In Gray v. Arism, cited in Junion v. Harini, Ambler 490. it was held that the prefemption of revocation was repelled by the tellator having made a provision for his civiliera by fettlement before marriage. In Junion v. Harlei, Lord Nurshington was of the

ime opinion.

Vide Brady, leffee of Novil, v. Cabin, Dirg. 31. In that case a person durised part of his property to certain uses. He afterwards made a settlement, limiting other lands, of the annual value of 1230 s. (subject to a jointage on his intended wife) to himilif in seet and then married and had a child, so the will as a subdiving informent; and it was raied not to be revoked.

The following note, relative to this fungers, was taken by the Editor:

" 6th Mar 1793.

" In the PREROGATIVE COURT.

" Wright against Neiberwood.

[A makes a will, leaving fame legacies, and a prointing his wife religious legates; file of on, leaving ferent of time. He married again, and and one chur by his second wife. Afterwards A with his wife and a 1 his chiltren pridate of his pareers. The will is not revolute.]

- "This case arose on a quadion, Whether the will of Garge Natienwood, deceased, was or was not reword?
- " On the 24th June 1783, the decersed married Elizabeth Lemax, spinfler. On the 8th of O3:ber following he made his will, whereby he charged his real estate with the payment of debts and legacies, if his personal should be deficient. He gave some pecuniary and specific legacies, and hequeathed the residue of his persenal chate to bis wife by her maiden name Elizabeth Lomax, and devised the real estate to her for life, remainder to one Toleph Netherwood; he appointed Wright, the party, executor of his effects in England, and another executor for his effects in the West loures.

" Afterwards Elizabeth died, leaving feveral children by her herband. The teliance married the falter of his farmer wife, and had iffue by her one fan.

"The faid George Netherward embacked for Expland from Jamaica with his wife, her fon, and all the children by the former marriage. The finip in which they embarked was never afterwards heard of, and was admitted to be loft.

"The will was proved by the executor in Legical, in common form, and he was afterwards cited by the next of kin of the deceased to prove it in illema form, or thew cause why it though not be declared invalid.

" The fails were admitted on both files to be as above fixted.

" Br the inventory the property of the decrafed appeared to amount to about 8000 L. The legacies amounted to rather more than 200 L.

"Sir William Sour and Dr. Nichell in support of the will.—The will in this case was not revoked by the second marriage and the birth of a child; for although it may be admitted as a general principle, that these circumnances do revoke a will, on the presumption of circumdances the testator did not continue to have the same intentions; that presumption is liable to be repeated by circumstances. If it appears to be his intention that the will should shand, marriage and the birth of a child will not delirov it.

"All prefumptive revocations are first jury, and must be wholly inconsistent with the deceased's intention to dispose of his property according to

the will.

"The general principle of these revocations is, that when a person has contracted such new obligations and relations, it cannot be supposed that he meant to adhere to his former disposition. That principle is recognized by all the cases upon the subject, and they all proceed upon the ground of a total alteration in the testator's circumstances; but if there is not a total alteration, the implication is repelled.

" No case can be stronger against a revocation than this. When he was

he made a will, by which he ed fome small legacies, and of the rest of his property to

This might be in confidence would take care of any chilhould have by her. The wife I the residue becomes lapsed. ies again, and his fortune will fame course in point of subif he had made no will. The ies will belong to the persons 1 they were given, and the rould be subject to the statute mtion.

ere are cases in which it has d. that this alteration of cirzs did not amount to a revowhere the alteration was not to make the Court say, the ould not in duty adhere to his sch was the case of Brown and , 1 Eq. Ca. Ab. 413., where eld that the alteration of cires was not sufficient to amount rocation; for no injury was r person, and those whom the vas bound to provide for were ure of (1); which case is in : the same as this; the great ld go to the wife and children; new relations are fully fatisd there is no probability of the not intending to adhere to the disposition. In Brady v. Doug. 31-38., it is said by ansfield, "that upon his ren there was no case in which and the birth of a child have i to raise an implied revocaere there has not been a difof the whole estate." And that may not be effectial, it aly very material. Presumed ons may exist where the residue mall, but it is otherwise where part only is disposed of, and s remains. In Thompson and , mentioned in a note to Amb. was held that marriage and children did not amount to a on of a will made by a witho had children. It was not mplete alteration of circuma declared intention. A case of Calder and Calder, lately decided in the Prerogative Court, does not apply. depended on its own circumstances; and there was no power to presume that the testator adhered to his intention. That was the case of a will made by a widower having no children; he had no view to the relations of husband and father. The great bulk of his property was left away, and there were declarations shewing his idea that his property would go to his wife and children upon a marriage subsequent to the will; and the will itself was such as would involve the family in endless litigation. Every circumstance in that case raised the implication, that the will should be revoked. No such circumstances exist in this case; but, on the contrary, every circumstance repels the implication.

" There would be a very confiderable provision for the wife and her child; and it must be presumed that he knew the operation of the will; that it disposed of the small legacies according to his intention; that the residue would be distributable according to law; and that his property would be managed by the respective persons in whom he had reposed a confidence for the purpose.

" The advocates for the plaintiff having here closed their arguments. the judge intimated a wish, that the case might be considered upon another point, viz. Whether the will (provided it was revoked) did not revive, as the fon by the second wife did not survive his father? For which purpose it stood over till the 13th of May; when the advocates before-mentioned argued on that point. In cases where it cannot be actually ascertained whether the parent or the fon survived, and they perished by the same stroke of death, according to the Roman law, it was presumed that if the son had not attained the age of puberty, the father survived; but if the son had attained that age, that he furvived the which implies the revocation of father. This presumption arises from

<sup>1)</sup> Fide the observations of Buller, J. upon this opinion, in Dee v. Lanceflire.

the degree of strength supposed to belong to the respective parties. It was liable to certain exceptions in behalf of claims favoured by that law for the interest of mothers, and in cases of siduciary bequests, and the rights of patronage. The general rule of presumption being applied to the present case, the child by the second wise being only about a year old, must be taken to have died before his father. The question then arises, Whether the will, if it was before revoked, was revived by the circumstance of the father surviving?

"Ey the Roman law, a will which was revoked by the birth of a post-humous child, did not revive by his death, because no change in the father's intention can in that case be presumed; but it was held otherwise with respect to the quasi postbumi, or those who were born after the will was made who were born after the will was made the testator's lifetime. On their death the will was restored by the Practorian law, as upon a new designation of intention.

"There is no case where it has been held by the law of England, that, under these circumstances, a presumptive revocation does take place. There are two points of time to be regarded in confidering the effect of the will: 1ft, The paction: 2d, The confumma-The will was undoubtedly good when it was made. Was it otherwise at the death of the testator? The prefumption of the law of England, with respect to revocations, is not more ftrong than the agnatio fui bæredis by the civil law, nor fo strong, for that was an actual revocation, and the other is only a prefumption liable to be repelled. The removal of the cause will as strongly imply a renewal of the first intention, or rather more strongly, on account of the omission to destroy the will; but by the Prætorian civil law it was held, that, upon the death of the agnatus, the will was restored. It is presumed, that the reafon why the testator did not revoke the will, was, that he was prevented by death; but, if the child dies first, the prefumption is, that, not having revoked the will, he intended it to stand.

At all events, the testator intended the legacies, on account of which ale this dispute is material, should be carried into essect, and that the execute whom he appointed should have a management of his property: And the Court, on a presumed intent, dides against the will, the actual itention of the testator will be deseate

Though it may be admitted that t will was originally good, it is a g neral rule that a will is revoked I marriage and the birth of a child.

" In the present case there was a t tal change in the testator's fituation from being a widower to becomin again a husband and a father:—fuch total change as to raise the presum tion that he did not intend the will stand. It has been decided by S Geo. Hay, that the cases of a widow and a bachelor are the same. The is no decision that the quantum of th property will vary the presumption It appears that the case of Brown an Thompson came on first before Sir Jak Trever, Master of the Rolls, who hek that the will was revoked; and after wards before Lord Keeper Wright who was of a different opinion on ac count of the particular circumstance of the case; and Buller, J. in Dee e. dem. Lancasbire v. Lancasbire, 5 T. R 49, 61., thought the opinion of the Master of the Rolls better than that o the Lord Keeper.

" There are some ditta of Lore Mansfield, but they are only dica, it Brady and Cubitt, that the will is no revoked by marriage and the birth o a child, if it only covers part of the property. In Doe v. Lancasbire, the revocation is held to arise from a tacil condition at the time of making the will. There may be some cases in which a will is allowed to fland, from circumstances repelling the presump. tion; but nothing is more dangerous than to let a particular equity, arising from the quantity of the effects, operate against a general rule of law. It would introduce a vague and uncertain method of decision, and it is better to adhere to a known prefumption of law. The disposition was complete by the

th as to the real and personal and the testator has not shewn, alteration in his circumstances, nation to adhere to it. Though estate is not within the jurishing this Court, it may afford an it in favour of the revocation as wholly devised away.

to the other point.—It is not ken for granted in this case. principles of the aw, that the child died first. Arine alluded to goes no furn to shew, that when the father perish by the same blow of he father is supposed to survive it son. But it does not appear his case they did perish by the w of death. The ship being y is all that is admitted; non hat they died by shipwreck. neral law is, that the will was : To take the case out of that revival by the father's furvivbe shewn on the other side. re passages in Dr. Zouch which nat in testamentary cases the tion of father or fon surviving opted.

the Roman law, if a will was the prætermission of a child rwards died, the will was not rendered valid; or, if it was by the birth of a posthumous ne death of that child did not :; and in case of a will becomby any subsequent cause, the of that cause did not restore it ivil law, though it was otherthe Prætorian law, which was ture of a court of equity, and vailed for the fake of the bæres or refiduary legatee. In this : refiduary legatee was dead, ground on which the jus praterposed fails. Any particuees only had the advantage of al incidentally, as it was allownd on account of the general iptus.

pose this case was to be decidne Roman law, and the will be restored by survivorship, it the restored in the present inor no alteration in the father's can be presumed to have

taken place after the fon's death: and it was only upon such presumption that, after an agnatio fui baredis, the will was by the Prætorian law restored. If the father did furvive a few minutes. there is no room to suppose that he had time to change his intention. But the doctrine of revival is no part of the civil law which has been adopted by the law of England. There is a case of Burrow and Baxter decided in this court; it is mentioned in Ambler 491. From the register it appears, that the wife brought no fortune and had a fettlement; there was a child who died before the testator, and yet the will was held to be revoked. As a matter of general learning, the Roman law is not adopted in these cases by the law of England, for they essentially differ from each other in many respects.

"Sir Wm. Scott and Dr. Nichollin reply.—The civil law, upon the grounds which have been already urged, is clearly in favour of the will; and the Court will not attend to distinctionsbetween jus pratorium and jus civile. Jus pratorium was as much a part offthe general system as any other, and in fact it was the predominating and over-ruling authority.

"The case of Barrow and Baxter is certainly contrary to the civil law; and it does not appear if those points were adduced, which in this cause have been urged in support of the will.

"With regard to the distinction which has been made between the beeres feriptus and a special legatee, the latter was as much intended to be benefited as the former.

"It being the established law that the death of a quasi postbumus revives the will, the distance of the interval between his death and that of the testator is not material against the presumption of law. The Court is not to examine by evidence whether there was an actual change of intention or not.

tions by marriage and the birth of archild, is, as laid down in *Brady* and *Cubitt*, a mere principle of prefumption; and, in that case, all the circumstances must be taken together, and

the state of the property may be very material. It is extraordinary, if there is any decision that a paper disposing of small legacies will be revoked by Subsequent marriage, &c., that no such case appears. The Courts have not gone the length of Lord Mansfield in Brady and Cubitt, by deciding that a revocation does not take place if any property is left: But there is no case where marriage and the birth of a child have been held to amount to a revocation, if the will was fuch as might have been made after these relations were contracted, fairly and without injury to the family.

"The disposition in the will in question only extends to a very small part of the property, and might be fairly made by a person having a family, the lapsed residuary bequest being as if it

had never existed.

" The testator having no wife or children at his death, the tacit condition (which in Doc and Lancasbire is considered as the principle of these cases) may be fairly considered as a condition that the will should not take effect if the testator should afterwards have a wife and children who furvived him.

" All the cases in the courts of common law admit, that the doctrine upon this subject is borrowed from the civil The Courts have not adopted all the minute rules and distinctions, but only some of the general principles; and there is no principle better founded on justice, than that if a will is revoked by the birth of a child, it is revived by his death in the life of the father.

" Judgment of the Court.

" Sir Wm. Wynne.—It is contended on the part of the next of kin, that by marriage and the birth of a child the will became void by implication of law: On the other fide it is contended, that the particular circumstances of the case rebut that implication.

" It is clearly the general law, that a will made by a bachelor is revoked by subsequent marriage and the birth of a child. That there is a distinction in the case mentioned by Ambler is, I think, a mittake. The principle of

the rule is, that the change of circumstances found a presumption that there is a change in intention, which may be as strong in favour of a second wife and family as a first; and it does not seem material whether the will was made by a widower having children, or a ba-

" The more weighty argument is drawn from the operation of the will. under the circumstances which have happened. The teftator has given legacies which are not very confiderable and the residue to his wife. That gift of the residue became void by her death. If he had left a fecond wife and fon, they would have had their share with the other children. In Brady and Cubitt it is said by Lord Mansfield, that there is no case of a revocation where there is not a total disposition, intimating, that the ground of revocation is an entire deprivation. However that may be, if there is an ample portion remaining after a few legacies to friends, there is no decision that a will would be revoked. The principle on which the cases have gone does not militate against such a will.

"This case is not exactly similar: The testator gave the bulk of his property to his wife early after marriage. She lived for feveral years, during which all their children were born. The birth of those children would not revoke the will, and he might mean to leave them in the power of their mother. She died; and it is not an improbable supposition, that he, knowing the effect of the will, suffered it to remain. There is a strong ground, then, to contend, that, under those circumstances, the case does not fall within the rule laid down and established for the revocation of wills.

" I was not aware of the case of Barrow and Baxter, in which the Court feems to think the fubsequent death of the child would not make an alteration; but the point feems a good deal like that which has been vexata quaftio in these courts, and brought before the courts of common law, whether a will, which is revoked by another, is fet up by the destruction of the second. There was a case to that effect

effect before Sir Geo. Lee of Hellyar and Hellyar, in which it was held, that the will being once revoked remained fo. There was an appeal to the delegates, but it was never determined by them. The case of Glazier and Glazier, 4 Bur. 2512., was directly contrary to that; and it was held that the first will was **\_2**00d.

" In Brady v. Cubitt it was laid who by Buller, J. that implied revoations must depend on the circumances at the time of the testator's death: That makes it material to inquire what hose circumstances were. The fact = , that having embarked, they all pe-The Roman law has been enered into, and it clearly appears by The Przetorian, which is confidered as The latter Roman law, that the revotion was entire and not prefumptive, and yet the will was held to revive.

"With respect to the priority of eath, it has always appeared to me happy cases to consider all the parties

as dying at the same instant of time, than to refort to any fanciful supposition of furvivorship on account of the degrees of robustness; and I rather suppose that is what is meant by Dr. Zouch in the passages alluded to.

"Then the testator, at the time of his death, had neither wife or children. Buller, J. says, It is to depend on the circumstances at the time of the testator's death: There is no circumstance to raife a prefumption that he intended at that time that the will should be revoked.

"On the first point I should have great doubt if the prefumed revocation did take place at all.

"On the fecond, As there were neither wife or children at the death of the testator, I am clearly of opinion that the Court ought to pronounce for the validity of the will."

As to parol declarations, &c., concerning the subliftence or revocation of the will, vide Brady v. Cubitt, and Doe v. Lancashire, ubi sup.

## Riots, Routs, and unlawful Assemblies.

See the flat. 13 H. 4. C. 7. 2 H. 5. c. 8. 19 H. 7. c. 13. and stat. 1 Ges. c. 5. 2 Rol. Abr. 82.

## Dominus Rex versus Ingram & al.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 215. S. C.]

INGRAM and many others were convicted of a riot To inquisition of on 13 H. 4. c. 7. before two justices of peace, toge- riot upon view, sheriff must be ther with the theriff. Et per Cur. 1st, If the rioters be party, otherwite convicted on view, the sheriff must be party to the inqui- not, and such infition; but if the rioters disperse before conviction upon quinton is por rege only. See view, the sheriff need not be party, for the justices may 6 Mod. 141. make the inquisition without the sheriff. 2dly, Such in- 1 Sid. 186. Quisition by two justices is pro domino rege, and need not Ravm. 186. be alleged capt. pro domino rege, & corpore comitatus, as an Carth 3°3.5.C. inquifition by a grand jury, who inquire as well pro cor- Comp. 422 Pere comitatus, as pro domino rege. 3dly, If the justices Raym. 386. Vol. II.

#### 593 ‡ Biots, Routs, and unlawful Affemblies.

Vide I Hawk. . c. 65. f. 31.

make not inquiry within a month after the riot, they are punishable; yet they may inquire after the month, for the lapse of a month does not determine their authority, but only subjects them to a penalty.

#### Dominus Rex versus Heaps.

[Pasch. 11 Will. 3. B. R. 1 Ld.Raym. 484. S. C. 12 Mod. 262.

riot and affault, acquittal of the riot is so of the affault. Vide 3 Salk. 384, 385. 2 Show. 93, 149. Vide post 642. pl. 14 2 Show. 93, &c. L 594 J

Indictment for a INDICTMENT, that the defendants riotofe & routofe & illicite affemblaverunt, & sic affemblati existentes riotofe & routofe insultum fecerunt in quendam J. Russel, &c. Upon not guilty, the jury found two defendants guilty, and acquitted the rest: And it was moved in arrest of judgment, that two cannot \* make a riot, and therefore cannot be guilty of a riot, and that all are acquitted by this verdict. On the other side it was said, that the affault and battery is charged in the indictment as well as the riot; and two defendants may, as they are found, be guilty of that.

Vide 3 Mod. 141. Hawkins's P. C. c. 65. Vide 1 Str 196. 3 Bur. 1264.

Sed per Holt, C. J. A riot is a specific offence, and the battery is not laid as a charge of itself, but as a part of the riot; for the riotofe & routofe runs through all, and is ascribed to the battery as well as the assembly. The consequence is, that these defendants being discharged of the riot, are discharged likewise of the battery; and no judgment can be given; and judgment was arrested.

## 3. Domina Regina versus Soley & al.

[Trin. 6 Ann. B. R.]

riot. Vide Hawk. P. C.

Unlawful affem- NFORMATION that the defendants tiel jour & bly necessary to a liver halling on the humanity of the property of the humanity of lieu ballivum & burgenses de Bewdley in Guihalda Burgi prad. affemblat. ad eligend. ballivum burgi pradict. pro anno c. 65. 2 Hawk. tunc prox. sequent. deservitur. in electione pradict. procedere vi c. 25. s. 55. et & armis clamoribus & vociferationibus illicite riotose & rouseq. Pop. 121. The defendants were found guilty, tose impediverunt. a And. 67. tole impediverunt. Inc defendants were round gunty, Moor 655. S.C. and upon motion in arrest of judgment it was held naught. Holt 3:3. Rep. 1. Because it did not appear that any right is claimed, nor A. Q. 100, 115. any such franchise pretended to, so that they might be doing an unlawful act (a); but if they had shewed a right to this franchife, this might be a disturbance to them in

(a) This point, which was not neceffary to the decision, seems very questionable. The law will not suffer persons to seek redress of their private

grievances by dangerous disturbances of the public peace. Vide 1 Hawk. ch. 65. f. 7.

the use of it; and to disturb another in the use of his just franchise, is an unlawful act. Vide 29 E. 3. 18. It Disturbing H. ia is a trespass, vide reg. 94. Asht. 434. Rast. 662. 2dly, franchise is a Because it is not said that the defendants unlawfully as- trespass. sembled; for a riot is a compound offence. There must be not only an unlawful act to be done, but an unlawful affembly of more than two persons.

## Domina Regina versus Soley & al.

[Trin. 6 Ann. B. R.]

NFOR MATION, that the defendants illicite, riotofe, Unlawful act to & routose assemblaverunt ad pacem perturband. & vi & bedone necessary armis offium cujusdam domus vocat. the Guildhall Burgi de 3 Inst. 176.

Bewdley, clausum existen. de cardinibus riotose & routose eleva- Hawk. P. C. verunt. The defendants were convicted, and upon mo- 157. S. C. Holt tion in arrest of judgment it was held naught, because it 100, 115. Vid. did not appear whose house it was: If it was the defend- Hob. 92. 5 Co. ants it was not an unlawful act. Every crime must arise 91. b. from an unlawful act (a). It is faid to be vocat. the Guildhall Burgi, but calling it so does not make it so. The Guildhall may belong to a private person as well as the borough. Vide Dy. 68. Yelv. 28. 3 Cro. 200. Yet the Chief Justice thought an affembly might meet together with fuch circumstances of terror as to be a riot. He called it 2 kind of affault upon the people. Vide Hob. 91.

1 Mod. 73. West. Preced. 149. Lamb. 108. 3 Keb. 623. 1 Ro. Rep. 49. 3 Mod. 3. Moor 786. pl. 1086.

[ 595 ]

- (a) Vide note to the preceding case.
- Domina Regina versus Ellis.

[6 Ann. At nisi prius in Middlesex, coram Holt, C. J.]

NDICTMENT against four defendants, for that If three, or more, they did riotously affemble, and vi & armis beat and affemble law-fully, and quarwound one Ellis. Upon non cul. it appeared at the trial, relling, fall upon that Ellis, who was the Enfield stage-coachman driving to one of their own London in the highway, the defendants, one in a chaise, company, it is and the rest on horseback, overtook him, and that the astranger it is, chaife was overturned by the coach, but not through any but in those only fault of the coachman; but that the driver of the chaife who concur. See 1 Mod. 13. and his company taking offence at it, followed the coach-cont. 2 Keb. man and beat him barbarously. It was objected upon this 558. 6 Mod. evidence, that this was a trespass, but not a riot, because \$.C. Holt 636. the company was lawfully assembled. Et per Holt, C. J. 1st, If several are assembled lawfully without any evil in-

5.95

tent, and an affray happens, none are guilty but such as act; but if the affembly was originally unlawful, the act of one is imputable to all.

Vide 1 Hawk. c. 65. f. 3. adly, If three, or more, are lawfully affembled, and quarrelling, all fall upon one of their own company, this is no riot; but if it be on a stranger, the very moment the quarrel begins they begin to be an unlawful affembly, and their concurrence is evidence of an evil intention in them that concur; so that it is a riot in them that act, and in no more. So ruled, and so found by the jury.

[ 596 ] Vid. tit. Motion.

# Rules of Court.

## 1. Sir James Butler's Case.

[Mich. 8 Will. 3. B. R.]

Defeating a rule of Court by a ftranger, is a contempt. UPON a rule of reference to arbitrators, they make an award for the plaintiff, and a stranger by contrivance defeats the party of the benefit of this award. Per Cur. It is a contempt to the Court, and an attachment shall be granted; for it shall not be in any one's power to defeat the rules of this Court, or render them inessectual.

## 2. Anonymous.

[Mich. 8 Will. 3. B. R.]

Confirmed largely.

I F a man enters into a rule in B. R. not to fue execution upon a judgment, and brings an action of debt upon the judgment, it is a breach of the rule. Per Cur.

## 3. Gregg's Case.

[Pasch. 5 Ann. B. R.]

Where an administrator fues, cannot bring money into court. See 6 Mod. 11, 25,

PER Holt, C. J. at the fittings at Guildhall, in an action by an administrator: The defendant cannot bring money into Court, because the administrator is not by law to pay costs; and, Pasch. 5 Ann. B. R., in Gregg's case, an action was brought by an executor for money due

to his testator for law-business done by him, it was moved 101, 153. Ante to bring so much money into Court, but denied (a).

Covenant and breach for non-payment of rent, and for may be brought not repairing, &c., it was moved to bring in so much for into court; in the rent; and as to the other breach, that the plaintiff covenant for might proceed as he thought fit. Et per Trever, All the rent, replevin judges have agreed, (for he put the case to Holt, C. J.) and avowry for that it is but reasonable to allow it: That it does not differ rent. S.C. from debt for rent; for though it be covenant, yet it is 24. Ante 89, 593. a covenant for payment of a sum certain. The same di- Mod. Cases 29. versity was taken between covenant for a sum certain and 1 Salk. 130.

Holt 472. chose incertain, per Holt, C. J., Hill. o Will. 3. B. R., faying it did not differ from an indebitatus affumpht. Et Trin. 12 W. 3. B. R., same rule (b).

In a quantum meruit bringing money into Court was de-597 nied. Hill. 8 Will. 3. B. R.; but, Pafch. 5 Ann. B. R., Quantum meruit. it was allowed e. motione magistri Raymond.

In trover for a horse, bridle, and saddle, it was moved to bring the faddle and bridle into court, but denied, Trin. 2 Ann. B. R., Wilcock's the attorney's case (c).

Replevin, defendant avows for rent, and plaintiff admitted to bring it into court. Hill. 10 W. 2. B. R. (d)

In ejectment upon an entry for non-payment of rent, the Court staid all proceedings upon bringing all the rent into court (e), and accepting a new leafe and fealing a counterpart. Downes versus Turner, Mich. 8 Will. 3. B. R.

(a) R. Crutc'ofield v. Scott, Str. 796. that in an action by an executor the defendant may pay money into court; and it was held that the effect of it would be not to make the executor pay, but only lose subsequent costs. Vide Barnes 280.

(b) In covenant, a defendant was allowed to pay money into court upon breaches for nonpayment of rent, and money agreed to be paid for plowing meadow land; but not generally. Fullwell v. Hall, 2 Bl. Rep. 837.

(c) In the case of Fisher v. Prince, 3 Bur. 1363., the following rule was laid down per Curiam: Where trover is brought for a specific chattel, of an ascertained quantity and quality, and

unattended with any circumstances that can enhance the damages above the real value, but its real and ascertained value must be sole measure of the damages; there the specific thing demanded may be brought into court.

Where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tors accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value; there it shall not be brought in.

In Whitten v. Fuller, 2 Bl. Rep. 002. on trover for a bond, a rule to stay proceedings on delivering up the bond and payment of costs, was discharged; the plaintiff infilting to go for special damages, as the obligor had died during the detention.

(d) R. acc. Vernon v. Wynne, 1 Hen. Bl. 24. Vide Barnes 429.

(e) By stat. 4 G. 2. ch. 28. if the tenant, at any time before trial in eject. ment for nonpayment of rent, pay to the lessor or his attorney, or into court, all the rent due and costs, all proceedings in the ejectment shall case.

593. H. 2 Ann. C. B. Money

In debt for rent, it was moved to bring so much into ccurt (a), and Halt, C. J. thought it hard; he said he remembered the beginning of these motions; the first was to bring in principal and interest upon a bond; after that it came to an indebitat. assumpfit: It has been done in debt for rent, but not so freely; we do it in ejectment on a special reason, viz. because that action subfits entirely upon the rules of the Court. Per Holt, C. J. Pasch. 10 W. 3.

In debt upon a bond (b); defendant must bring in the whole penalty, or the Court will not stay proceedings. Hill. 9 W. 3. B. R. But jemble ne poet effre without bringing in the whole money. If the parties dispute the quantum, and there is a dispute how much is due, ne poet effre referre. Trin. 11 W. 3. B. R. (c)

(.) It may be brought into court, Bur 11: 280.

(6) By stat. 4 and 5 Ann. ch. 15. in any action on a bond with a penalty, with condition for payment or a letter tum at a day or place certain, on bringing into court all the principal and interest due, and all coffs in law or equity (vide Siner v. Neviyon, Ser. 639. Licky. Stermer, B. R. Hard. 116.), it shall be taken in satisfaction of the bond. - Upon bonds for payment of money by initalments, the in stalments in arrear may be brought into court, Lucas v. Lendon, Ser. 9;8. Barnes 288. Vide 3 Bur. 1374. The defendant had leave to pay the penalty on a bond to indemnify a parish against a ballard into court, Branguin v. Perrat, 2 Bl. Rep. 1190.

(c) In Ser. 787. it is faid that the first motion to bring money into court was in Kelyng's time, and introduced to avoid the hazard and difficulty of

pleading a tender.

In actions for mere tert, it has been repeatedly determined that money cannot be paid into court, e.g. for immoderately driving a hired chaile, White v. Woodbouse, Ser. 727.; or for dilapidations, Squire v. Archer, Sr. 907.; or for meine profits after judgment in ejectment, Holdfaft v. Morris, 2 Wilf.

Neither can it be brought in upon covenant to render the beil beaft or pay money at the plaintiff's election,

Barnes 289.; nor on a bond from a bailiff for his good behaviour, Barnes 205.; nor on bond for performance of covenants in a leafe, Barnes 286.

The general rule is laid down in Halle v. the E. I. Comp. 2 Bur. 1120. as follows: " Where the fum demanded is a fum certain, or capable of being afcertained by mere computation, without leaving any other fort of diferetion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into court, and have fo much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril."

In allumplic against a carrier, the defendant was allowed to bring a fum of money into court, upon an affidavit that he had published an advertisement that he would not be aniwerable beyond that fum without a special entry, Hulton v. Bolton, Hen. Bl. 299. n. la Gunning v. Moris, 5 Term R. 87. the declaration star, I that the defendant was indebted in a fum of English money on bond in a fum of proclamation money of North Carsina (dated before the American war); an application to pay into court the amount of the penalty in proclamation money was discharged, proclamation money having fince the forfeiture lost its value. Grofe, J. said, We ought not to permit money to be paid into court, and to flay the proceedings, except where the justice of the case requires it; and this is not such a case.

In an action on which money cannot be regularly brought into court, (e. g. against an attorney for negligence,) if the plaintiff takes it out he waives the irregularity, Gripths v. Williams, 1 T. R. 710. Money may be brought into court in actions upon

penal flatutes, Str. 1217.; and if two penalties are fued for, the amount of one may be paid generally, Stock v. Eagle, 2 Bl. Rep. 1052. In an action against three, one suffered judgment by default, another was outlawed, the third was not allowed to pay money into court, Kay v. Panchiman, 2 Bl.

#### Elliot versus Callow. [Mich. 9 Ann. B. R.]

EFENDANT brought money, viz. 10 l., into Though plain is court, and had it struck out of the declaration. Af- is nonsuit, yet he terwards the plaintiff suffered a nonsuit; and the question brought in upon was, Whether he should be allowed to take this money? Ariking it out of Et per Cur. He shall (a); for so much the defendant has ad- the declaration.

(a) The plaintiff is entitled to have the money out of court, though he proceeds and has judgment which is arrested, Fisher v. Kitchingman, Barnes 284. If a verdict is given for the defendant, he may have the money paid in towards his colls, Barnes 280. anon, but if the plaintiff is a pauper it is otherwise, Lee v. Holiand, Bunb. 287. Consequently the plaintiff is in all cases entitled to the surplus, if any, after deducting costs. Money paid into court under a rule, being a payment on record, the party can never recover it back, though it afterwards appear that he paid it wrongfully. Per Buller, J. Malcolm v. Fullarton, 2 T. R. 648.

In Cromp Prac. 147. it is laid down, that if the plaintiff declares in assumpfit on an agreement, and defendant pays money into court, he admits the agreement, if the declaration is upon the agreement only; but if there are other counts, he may pay money into court on one of those counts, and then he will not admit the validity or extent of the agreement. In Banougb v. Skinner, 5 Bur. 2639. being an action against an auctioneer, for a deposit upon a void sale, the defendant having paid money into court, the court were clear with the plaintiff as to the

merits, and thought the defendant had acknowledged bimself to be liable to the action by paying money into court. In Cox v. Parry, 1 T. R. 464. the defendant paid money into court upon an action on a policy of infurance; the plaintiff proceeded to trial, and obtained a verdict for a larger sum; but the court, on a motion for a new trial, were of opinion that the policy was void; whereupon a question arose, Whether the defendant, by paying money into court, had not precluded himself from making the objection; as to which it was held, that paying money into court admits the plaintiff has a right to maintain the action, and reduces the question simply to the quantum of damages which he is entitled to recover. In that case, if the defendant had not paid money into court the plaintiff must have been nonfuited, he has admitted that the plaintiff is entitled to maintain his action to the amount of that fum; but nothing more. He does not vary the construction and import of the policy fo as to entitle the plaintiff to recover beyond that extent. In Jenkins v. Tucker, H. Bl. 90. the defendant having paid money into court de-murred to the evidence, which Lord Loughborough said struck him as very absurd,

#### 597 ‡

#### Scire Facias.

Temp. Hard. 206. Barnes 284. Pract.

mitted to be due, and so much he has actually paid him; Vide Rep. B. R. and if the cause had gone on to trial, there must have been a verdict for the plaintiff as to so much; for this is admitted to be due, and paid down as the plaintiff's mo-Caf. ney; otherwise perhaps of money paid into court by way of Prac. C. B. 36. of tender. If a man pleads a tender & uncore prist, and pays the money into court, and the plaintiff takes issue on the tender, and it is found against him, the defendant shall have the money. Sty. 388.

abfurd, fince the defendant admits a cause of action, so that there can be no fuch a thing as a nonfait (1), and also because it was for the jury to determine upon the quantum of damages. If the plaintiff takes the money out of court in the first instance he is entitled to costs up to the time of paying Where he proceeds afterwards, but discontinues or accepts the money, &c. besore trial, he is entitled to costs to the time of paying it in, and the defendant to subsequent costs, Barnes 280, 282, 284, 287, 357. Hartley v. Batefen, 1 T. R. 629.; but if he proceeds to trial, and a verdict goes against him, Stevenson v. Yorke, 4 T. R. 10.; or he is nonsuit, Kabell

v. Hudsen, id. ibid.; or juror is withdrawn, Stodbart v. Johnson, 3 T. R. 657.; he is not allowed any costs. If the defendant pay the money on particular counts, the plaintiff, on taking it out, is in the King's Bench only entitled to his costs on those counts, Bailie v. Cazelet, 4 T. R. 579. The contrary was ruled in C. B. Hellier v. Hallett, Barnes 286. The plaintiff must give the appointment for taxing, Kabell v. Hudfon.

The Court of King's Bench, in a case where the action was attended with opprefive circumstances, allowed the debt to be paid into court without costs, Johnson v. Houlditch, 1 Bur. 578.

(1) Qu. & wide Kabell v. Hudfon, infra.

## [598]

## Scire Facias.

#### Panton versus Hall.

[Trin. 1 W. & M. B. R. Rot. 130.]

Judgment against two; scire facias against one, ill. Vide post 601. Faiell. 3, 4, 6. S. C. Carth. 205. Vide Co. Ent. 621. a. , . , so Vin. 547. 3 D. 334. p. 6. Vide Skin. 82.

A Judgment in debt was recovered against A. and B., and a feire facias awarded against the tertenants and the heir of B. The sheriff returned a scire seci as to the heir, and returned several persons tertenants in balliva sua, warned; they appear and plead in abatement, no fcire fa-cias had been awarded against A. The plaintiff replied, that he at such a time such out a scire facias against A., and 1 Rol Ab. 888. fet it forth. 'This replication was held naught on demur-Allen ar. S. C. rer, for a feire facias is a judicial writ, and must pursue

the nature of the judgment; therefore as the judgment is joint, fo ought the scire facias; whereas here they are as several independent suits. 2 Ro. 276. 20 H. 7. 3. Cro. Gar. 517.

2dly. The return is ill, for it should not be, that A., B., Return of sci. and C. are tenants of lands in balliva fua, but A., B., and feci against ter-

C. are tenants of all the lands in balliva fua.

tenants ought to be of all the tertenants in balliva sua. Herne 326. 2 Brownl. 392.

2. Tully's Cafe. [Hill. 6 Will. 3. B. R.]

IN error to reverse a fine, though in strictness of law a Error to reveale fcire feci being returned against the conusees, is suffi-cient; yet for fear of purchasers, and in savour of them, Vide Hard. 163. there shall be a scire facias against the tertenants.

tertenants. Comb. 318. Dyer 321. Co. Ent. 233. Cro. El. 474, 739. Mo. 524.

## Hardisty versus Barny.

[Hill. 7 Will. 3. B. R.]

IF a judgment be above ten years standing, the plaintiff Where scire facannot sue a scire facias without motion in court (a); if cias shall issue on motion, and under ten, but above seven, he cannot have a scire facias where without without a motion at fide-bar. Note; If after such mo- S.C. Comb. 356. tion and judgment revived by scire facias, the defendant dies before execution, the plaintiff must sue a new scire facias, but may have it without motion; for the judgment was revived before. Per Cur.

(a) In Coysgaine v. Fly, 2 Bl. Rep. 995., on a judgment of above twenty years old, and in Bagnall v. Gray, id. 1140., on a judgment of ten years old, the Court of C. B. gave leave to sue

out a sci. fa.; but execution only to issue on a return of scire feci, or an affidavit of personal service on the defendant.

## Anonymous.

[ 599 ]

[Trin. 8 Will. 3. B. R.]

N C. B. there is but one scire facias (b), and upon nihil Rule for suing returned execution. In the King's Bench there are two ing scire facias. scire facias's and two nibils returned, and heretofore both Farell. 5, 6, 40,

(b) On which there must be fifteen days between the teste and return, Imp. C. B. 513.

56, 68, 69, 138. were fued out together by making the tefte of the second as 6 Mod. 86, & if the first were returned; but now the Court made a rule infra, pl. 7 & 12. Cumperb. 452, that both should not be sued out together, but the first 428. Prac. Reg. should be duly returned before the second should be sued out, and that the second should be tested the day of the return of the first.

#### 7. Lugg versus Goodwin.

[Mich. 10 Will, 3. B. R. 1 Ld. Raym. 393. S. C.]

Against principal in hac parte, and fendant was, in bac parte. Et per Holt, C. J. on search bail in ea parte.

Farell. 4. S. C. of precedents; where it is against the desendant himself, Cases B.R. 214 it should be in bac parte; where against the bail, in ea parte (a), and this will reconcile the precedents.

(a) In bac parte against bail, ruled the most proper, Lord Raym. 532. to be sufficient, and said by Holt to be Bringar v. Allanson.

#### 6. Anonymous.

[Trin. 11 Will. 3. B. R.]

1360.

Seire facias
against bail must
to charge the bail must lie four days exclusive in the lie in the therist's hands a conveni. therist's office, but there is no fet time for a scire faciar. est time. Bur. Same rule laid down Mich. 10 W. 3. B. R. But a feire facias against bail must lie a convenient time, and the first scire facias may be antedated even in term-time, per Clarke fecondary. Sed per Holt, C. J. It cannot be antedated where it issues by rule of Court (b).

(b) The Court will not examine 1 Bl. 393. The scire facias must lie in whether a ca. sa. be actually returned the office four days, Agr. Millar v. leaving it in the sheriff's office is a notice to the bail that the plaintiff will proceed against the person of the defendant, Hunt v. Cox, 3 Bur. 1360.

before the iffing of the sei. fa. the Garraway, 3 Bur. 1723. R. that it must lie in the office the last four days before the return, Forty v. Hermer, 4 T. R. 583.

#### 7. Goodwin versus Peek.

[Mich. 11 Will. 3. B. R. Comyns 53. S. C.]

Fifteen days in-clusive between ber, and returnable the 31st day of October; the alias tefte of first and was tested the same day, returnable the 7th day of Novemsufficient. Vide ber; Shower objected, there ought to be fifteen days exclusive

clusive between the teste of the first and return of the last. post 602. 1 Lutw. But the Court held, that here being fifteen days inclusive, 26. Mod. Cases 146. S.C. Carth. it was very well, and the practifers agreed it. Vide 2 Jones 468. Cases B. R. 228. (a)

215. Holt 759. Str. 1139.

(a) Vide Peale v. Watson, 2 Bl. Rep. between the teste and return of the sci. 922. Four days exclusive are sufficient fa. when the proceedings are by bill.

#### Proctor versus Johnson.

600

[Pasch. 13 Will. 3. B.R. 1 Ld. Raym. 669. S. C.]

Vide 3 Lev. 100. Lutw. 1268.

N a judgment in ejectment in C. B., a scire facias Scire facias lies was brought against the casual ejector, suggesting, on a judgment in ejectment that fince the judgment A. and B. ingressis sunt & modo te- Ante 258. nent. And on demurrer, judgment given quod haberet execution., and upon this award of execution a writ of error was brought in B. R., where the objection was, that a scire facias lay not on a judgment in ejectment; for at common law it lay only in real actions; and the statute gives it only in personal. Vide 2 Inft. 469. Et per Holt, C. J. 1st, At common law there was a scire facias on a judgment in real and mixed actions. It lay on a judgment in assize, for the land was bound by the recovery, which was a good title, and there was no other way to execute the judgment upon change of parties, as there was in case of judgment for debt and damages, where debt lay on the judgment.

on a judgment

adly, The scire facias may either be general against all Writ general. tertenants, or against the tertenants, naming them (b).

3dly, That strangers may falsify, but those that claim under the judgment are estopped and bound by the judg-

(b) In Comb. 282. it is said, that if a person undertakes to name them, he must be sure to name them all.

#### Withers versus Harris.

3 D. 331. p. 11, 332. p. 6. Far-

S. C. ante 258.

[Mich. 1 Ann. B. R. (Vide this case, title Ejedment, pl. 11.) 50,64. 3 Saik. 2 I.d. Raym. 806. S. C.] 319. Holt 77,

I T was faid by Holt, C. J. I am not fatisfied with the Whether scine opinion of my Lord Coke on West. 2., that at common facias lay in perfond actions belaw no scire facias lay on a judgment in a personal action, fore West. 2. till West. 2., for the words five alia quecunq; irrotulata came after contractus and conventiones, and therefore cannot be construed of judgments; but the law has been otherwise taken, and I must submit; it is plain it lay on a judgment in annuity.



#### Scite Facies.

3. C. ante 564 .. Poft 659. 6 Mod 132, 42. 3 D. 314. p. 6. Holt 612.

10. Shuttle versus Wood.

[Mich. 2 Ann. B. R.]

Stire facias against bail in B. R. must be Aleyn 12 1 Cro 312. Barnes 96. # Bur. 409. 2 Cromp. Prac. 81.

N a recognizance taken in B. R., the feire facias must be brought in Middlesex; for the recognizances there brought in Mid- are not obligatory by the caption, but by their being endefex, and not tered of record in the court; fo it is of debt: But on a reelsewhere. Lutw. cognizance in C. B., the scire facias may be laid in the 236. 3 Lev. 235, 245. Cro. county where the caption was, or in *Middle fex* where it is Jæ. 331. Hob filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there, and it is also filed at Welminster in C. B., and there re-2 Bt. Rep. 769. mains of record. Vide Al. 12. 1 Cro. 312. Hob. 195.

601 S. C. 1 Salk. 40. and post 679.

Adams and Tertenants of Savage. II.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1253. S. C.] 6 Mod. 134, 199, 226. 3 Salk. 321. Hok 179. Lilly Ent. 398.

Tertenants returned for several parts cannot join in a plea which goes to one part only. See before 598. pl. 1. 2 Saund. 23. Farell. 15. 6 Mod. 134, 199-

AN administrator brought a scire facias on a judgment recovered by his intestate against H, and the writ was general against such as were tenants of the land of H. at the time of the judgment. The sheriff returned feveral tertenants warned; among the rest one A., seised of a messuage and of a manor called D. The tenants appear, and all join in this plea, viz. that J. S. is seised of the freehold of the manor of D., & petunt judicium de brevi, & quoad breve ill. cassetur. Et per Curiam the plea was held ill; and resolved,

1st, That the tertenants cannot join in this plea, because they are severally returned, one for one part, and another for another.

Where non-te-2dly, This is pleading a non-tenure by implication as to the manor of D. Now in a scire facias on a judgment in nure may be pleaded generally or specially. Vide ante 569. debt, or any personal action, the defendant cannot plead non tenure generally, because it is contrary to the return of 3 Keb. 25, 50. the sheriff, but he may plead a special non tenure in such 3 Lev. 205. 6 Mod. 226. case; and so the law is now after long and great difficulty 1 Keb. 55, 310, settled. 3 Cro. 872. 8 E. 4. 19. 9 H. 5. 11. But in a 351, 352. 2 Keb. 587, 636. fcire facias for execution in a real action, the defendants may plead a general non tenure; because their freehold, which is much favoured in law, is in question.

2 Saund. 23. 1 Mod. 29. 1 Sid. 436. 2 Keb. 529, &c. Mo. 525.

3dly, The tertenants in this case may plead there be other tertenants not named in the same county, and pray judgment if they ought to answer, quousque the others be summoned, but ought not to pray, quod breve cassetur; for the Court ought never to abate the writ, but where the plaintiff can have a better writ; otherwise if the

Writ

writ had been particular in naming the tenants. Vide 2 Saund. Jeffreyson versus Dawson, a good precedent: And they seemed to doubt whether the tertenants could plead other tertenants not warned in another county (a); and the Chief Justice cited Owen 104., that tenant for years may be a good tenant to plead in bar to a fcire facias to a personal action where damages are recovered, but not in a real action. Vide Co. Ent. 702, 624., 2 Cro. 506. Cro. El. 740. 2 Saund. 8. Palm. 241. 2 Ro. Rep. 53.

(a) It has been decided that they ter, 2 Vent. 104. 4 Bac. Ab. 419. enay so plead, vide Prynne v. Slaugh- Clift. 672.

#### Ball versus Manucaptors of Russel.

[602]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1176. S. C.]

SCIRE facias against bail, fetting forth, quad cum que- Scire sacias on rens recuperaffet against one Russel, and the defendants recognizance of devenerunt plegii, that he should either pay vel se reddere bril assigning breach, that the prisona Maresc. Mareschal. nostra. The defendant prayed defendant did oyer of the recognizance; and that was, that he should not pay nor ren-pay, vel se reddere prisona Mareschalli Mareschalsa domina Mares. nostra; regine coram ipfe regina, quo letto & audit., the defendant sufficient. Vide pleaded, that there was no capias ad fatisfaciend. returned Lutw. 1273. against the principal; the plaintiff replied, there was a capias ad satisfaciend., and set it out; the defendant demurred. It was objected by Pengelly, that the over given was defective, not shewing of what term the recognizance was, fo that it did not appear to warrant the scire facias, or that it is what the scire facias is brought upon: That the capias Let forth appears to have but four days between the tefte and return, and that there is no breach assigned by the fcire facias, for the render by the recognizance ought to be to the marshal of the King's Bench prison; but the breach is, that he did not render himself prisone Mareschalli Mareschalsia nostra, which is the prison of the palace. Vide 10 Co. 68. b. Thes. Br. 233. N. Br. 251. J. 5 E. 3. c. 8., and Spelm. Gloff. in boc verbo. To this it was answered and resolved by the Court,

1st, That though the oyer be imperfect, yet there is no variance between the feire facias and recognizance, and fince they agree together, the recognizance is a fusficient ground for the scire facias; but the defendant should not have gone on, but infifted upon his want of oyer.

adly, There ought to be eight days between the tefle and Eight days must return of the capias ad satisfaciendum against the principal, be between the by the practice and course of the Court; and if the de- of capias ad sasendants had moved for the irregularity; the Court would tisfac. against the

to charge the

principal in order have helped them: But in point of law, the process of this Court may be returnable de die in diem, especially into Middlefex; and therefore they shall not take advantage of this which is but an irregularity, upon demurrer.

Vide ante 599. pl. 7. 439. Farell. 40, 96, 146.

3dly, All other marshalfeas were derived from the Earl Marshal of England, and the Marshal of the Houshold is never stiled Mareschallus Mareschalse nostre; and this be-138. I Lutw. never filled Marejcoanus Marejcoanja nonva; and this be-86. Mod. Cases marshal here must be intended the marshal of this Court. Judicium pro quer.

[ 603 ]

13. Attwood versus Burr.

S. C. ante 87, 402. Fa:efl. 3. Carth. 4+7.

[Pasch 5 Ann. B. R. 2 Ld. Raym. 1252. S. C.]

3 Salk. 369. Lilly Ent. 225, 403.

Judgment on a feire facias againft bail, reversed for want of warrant of attorney. 5 Mod. 397. called Attz Salk. 89, 402. 6 Mod. 304. Comberb. 149, 161.

A Writ of error was brought upon the award of execution on a feire facias against bail, and thereupon the record of the judgment against the principal was also returned. It was assigned for error, that the scire facias was sued out and profecuted by J. S. his attorney; but no warrant of wood vers. Duell, attorney entered of record. It was answered, that J. S. appears to have been the attorney in the principal cause, and in that to have had a warrant, but the Court reversed the judgment; for the record against the principal need not have been certified upon this writ of error, and the fuit against the principal was another distinct suit; therefore there ought to be a particular warrant of attorney for this scire facias against the bail, and this warrant ought to be entered, not before the writ fued; for any body may fue out the scire facias; but upon the return thereof, for then the fuit commences (a).

(a) R. That it is sufficient if the warrant of attorney be entered of the term the placita is of, though the writ is returnable, and the party appears the preceding term, Henriques and others v. the Dutch W. I. Com. 2 Ld. Raym. 1532. 2 Str. 807. Vide Richards v. Brown, Doug. 113. Vide flat. 25 G. 3. c. 80. f. 13 to 19. A fci. fa. is an action, Co. Lit. 290. b. Treviban v. Laturence, 2 Ld. Raym. 1058. Barlow v. Evans, 1 Wilf. 98. Grey v. Jones, 2 Wilf. 251. Pultney v. Townson, 2 Bl. Rep. 1277. Fenna v. Evans, 1 T. R. 267.

14. Anonymous.

[Pasch. 5 Ann. B. R.]

N the case of the king there need not be any scire facias after the year.

## Service and Suit.

Vide Co. Lit. 70, 83, and 107. 3 Lev. 21. 4Ca 8, 9, &c.

#### Tomkins versus Crocker.

Pasch. 2 Ann. B. R. 2 Ld. Raym. 860. S. C. with other points.]

IN replevin, the defendant made conusance for fealty, Service by doing rent, and suit of court, and the suit of court was laid of a manor twice to be suit to the court of a manor twice a year. The plain- a year. Carth. tiff confessing a tenure by fealty and rent, traversed the te
Same
names. Cases
nure by fealty and rent, and suit to the court of the manor B.R. 369. Holt twice a year. The jury found there was but one free- 452. 2 Lutw. holder tenant of the manor, and that time out of mind an Lex Man. Ap. ancient court had been held before the steward, and that 67. feveral freeholders, tenants, did fuit to it, and that the plaintiff held by the service of doing suit ad cur. man. pred. bis in anno apud man. prad. Mr. Raymond objected, that the court found by the jury is not the court claimed by the conusance; for curia manerii is the court-baron, which is incident of common right, and therefore no title need be made for it, nay it cannot be prescribed for; whereas this court here found is a special customary court, for which he ought to make title in his conusance, and not a curia manerii. Vide I Inft. 58. 2 Inft. 99. 1 Inft. 268. Noy 20. Et per Holt, C. J. and Powell, J. As a court of pie-powders may be to hold plea of things out of the market, and yet is a court of pie-powders; so may a court of a manor be more than a court for suitors every three weeks, and yet be a court of a manor: There may be a manor court to be held before the steward bis in anno. Vide 1 Leon. 316. And it is to inquire of arrearages of rents and fervices: And the fuit to fuch court shall be intended by refervation before the statute of quia emptores terr. Vide 12 H. 7. 18. One that is not resiant may be bound to do suit real; for it shall be intended a suit-service reserved on creating the tenure: And the Court held in the principal case, that the fuit set forth in the conusance was expressly found by the special verdict (a).

(a) It appears by the report in the issue for the desendant in totiden: Lord Raimond, that the jury found werbis.

Vide ante 470, 474, 475, 476, 477, 479, 480, 482, 490, 491, 494. 5 Mod. 329. 2 Hawk. P. C. cap. 8. and Burrow's Sef-Sons Cafes.

# Sellions General and Auarter.

## 1. The Case of the Parish of King-Langley.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 481. S. C.]

Appeal may be adjourned from one quarter-lelfigns to another. Vide ante 494. Post 606, 608. S. C. Cafes and Rem. 120, 214.

A Motion was made to quash an order of sessions, because the justices had adjourned the appeal from one seffions to another, and so the determination upon the appeal was not at the next quarter-fessions: Sed non allocatur; for the appeal must be lodged at the next quarter-sessions; B.R. 260. Set. yet when it is lodged, the justices may adjourn it. Per

#### Inter The Parishes of Lingfield and Battle.

[Pasch. 1 Ann. B. R.]

CAPTION of an indictment of sessions was, session tent, micelium les minelium of sessions was, session of the s Seffions cannot be entered as I tent. vicesimo & vicesimo octavo die Julii, &c. Et per fitting three days together. Ante Holt, C. J. It is naught, for though a fellions may adjourn 494. Poft 606, from one day to another, and so sit by adjournment, yet 608. S.C. Set. it must not appear in a lump, as sitting three days togeand Rem. 143. ther, but distinctly.

## Domina Regina versus Savin.

[Pasch. 2 Ann. B. R. 2 Ld. Raym. 871. S. C.]

county-flock.

Seffions cannot AN order of fessions was made, that the clerk of the make an order to A neace should answer peace should prosecute an indictment of barretry profecute an of-fender out of the found against J. S., and that the charge be allowed out of the county-stock. Note: By 43 Eliz. c. 2., the justices have power to dispose of the surplus to charitable uses; upon which clause it was offered to maintain this order: But the Court said this was not to take place out of the surplus, but out of the original stock; besides, a gift of lands to raise money to prosecute offenders, would not be good as a charitable use (a).

(a) Particular provision is made for provision for the profecution of infe-the expence of profecution in cases of rior offences. By stat. 12 G. 2. c. 29.

felony by 25 G. 2. c. 36. 27 G. 2. c. 3. f. 6. the treasurers of counties are di-18 G. 3. c. 19. but there is no general rected to pay the money raised by

county rates, according to the direction of the general quarter-sessions for the purposes in the acts there recited, and for any other uses or purposes to which the public flock of any county, &c. is or shall be applicable by law.

Upon which it has been ruled, that the quarter-sessions may order a sum of money to be paid for contesting the legality of a fine imposed on the county, Rex v. Inhabitants of Esex, 4 T. R. 591.

#### Anonymous.

[ 606 ]

[Mich. 2 Ann. B. R.]

TATHEN a statute gives a penalty to be recovered before justices of peace, and prescribes no method, it ought to be by bill. Per Holt, C. J.

5. Inter The Inhabitants of St. Andrew's Holborn and St. Clement Danes.

[Mich. 3 Ann. B. R.]

PON a certiorari the following orders were removed Seffions may after into B. R. 1st, An order made at the general quarter- and set addetheir fessions of Middlefex, 1704, which recited an appeal made same sessions. at the general fessions of the peace for the same county in Ante 494, 605 September 1704, by the parish of St. Clement Danes, against Post 608. 5 Mod. 396, 417. S. C. an order of two justices, to remove one Mary Gear from 6 Mod. 287. St. Andrew's Holbern to St. Clement Danes, as the place of her last legal settlement; and that it was thereupon ordered, that the faid appeal should be determined such a day this sessions, and that the churchwardens, &c. of St. Andrew's Holborn should then attend, and then went on and ordered, That forafmuch as it appeared to the Court upon oath, that a copy of the faid recited order was ferved upon the churchwardens, &c. of St. Andrew's Holborn; and for that the churchwardens, &c. of St. Andrew's Holborn had neglected to attend, the Court allows the appeal. 2dly, An order which recited, That whereas the churchwardens, &c. of St. Andrew's Holborn, had then paid in open court to the churchwardens of St. Clement Danes 40 s. costs allowed to them, because the churchwardens of St. Andrew's Holborn neglected to attend, upon which the appeal was allowed, and the order of the two justices vacated; and then ordered, that for good reasons shewn unto this Court, it is ordered, that the faid recited order of this Court made on Monday last, be vacated and discharged, and that the said appeal be reheard. 3dly, An order fetting forth, That upon hearing the appeal of St. Clement Danes, it not appearing that Mary Gear hath any legal settlement in St. Andrew's Holborn, or elsewhere, Vol. II.

[607]

2 Cro. 341. 1 Jo. 330. 8Cro. 350, 351.

fave in St. Clement Danes; this Court doth dismiss the faid appeal, confirm the order of the two justices, and order the faid Mary Gear to be continued in St. Clement Danes. Mr. Darnel moved to quash the second and third orders; he argued, that the hands of the Court were tied up by the first order of sessions; sed tota curia contra, and Holt, C. J. That during the sessions, the order was in the breast of the Court; and though it was drawn up, yet it was fo far in the breast and power of the Court, that by the second order it ceased to be a record. The Court at the Old Bailey have altered and fet aside their judgments ten times the same sessions; where judgment de pain fort & dure has been given, the Court have after let him in to plead, and after upon his trial he has been convicted, and has had another judgment against him to be hanged. So it is of judgments here; which during the same term are in the breast of the judges; but then, he said, they ought to fet the first order wholly aside, and have entered up the third order as the only order; for the effect of the Court's fetting aside of the first order is, that it ceases to be an order, and consequently ought not to be returned to us as an order vacated by another order, but it should have been annulled and made nothing; as in this Court we cannot enter up one judgment upon record, and then enter a vacat of that, and then enter a contrary one: The fessions as well as the term is but one day in law. But the matter was referred to the three puisne judges; & sic quievit.

#### The Case of Foxham Tithing in Com. Wilts.

[Hill. 3 Ann. B. R.]

Order of festions quashed, because it concerned one of the justices named in the Hile of court. S. C. Sett. and 517.

A Justice of peace was surveyor of the highway, and a matter which concerned his office coming in queftion at the fessions, he joined in making the order, and his name was put in the caption. Et per Holt, C. J. It ought not to be; as if an action be brought by the Chief Rem. 171. Holt Justice of the Common Pleas in the Court of Common Pleas, the placita must be coram Edro Nevill Mil. & Sociis suis, and not coram Thoma Trevor, &c. And it was quashed.

#### 7. Inter The Inhabitants of the Parishes of South Cadbury and Braddon in Com. Somerset.

[Mich. 9 Ann. B. R.]

N an appeal to the sessions the Court discharged the Thesessions need first order, and now Mr. Earl moved to set aside the not set forth the order of discharge, because the justices do not say where judgment. S. C. ther they discharge it for form, or on the merits; for if Sett. and Rem. it was for form, the parish is not bound; but if on the 172. merits, the parish in consequence is hereby discharged for ever. Et per Cur. 1st, The justices are not bound to express the reason of their judgment in the judgment, no more than other courts; and if it was otherwise held in the late Chief Justice's time, it past without due consideration. The reason of their judgment must be collected from the record; as where judgment is arrested upon an insufficient indictment.

\* If the fessions reverse the first order, and that being Orders reversed, removed appears to be good, this Court must intend ante 472, 486, it was reversed on the merits, and affirm the order of 6 Mod. 287. fessions.

**\*** [608]

If the sessions reverse the first order, and that being removed, appears not to be good, we must intend it was reversed for form, and affirm the order of reversal.

So if the fessions affirm the first order, and that appears to be good, we must affirm the order of sessions.

But if the first order appears bad, and the sessions affirm it, this Court must reverse it, because it appears naught.

# Sheriffs.

Dominus Rex versus Daws.

Vide 10 Co 99, 100. 1 Salk. 99, 175.

[Hill. 13 Will. 3. B. R. 1 Ld. Raym. 722. S. C.]

AWS was taken upon an attachment for a contempt Sheriff may take die veneris prox. post Crastin. Santia Trin. and the bail-bond on an strachment of theriff took a bail-bond for his appearance, and suffered contempt, but him to be at large. Daws would not appear, the sheriff the profecutor was amerced. The profecutor refused to accept the assign-may refuse to ment of the bail-bond; and Raymond moved, that farther Cas. 172. S. C.

amer- Cafes B. R. 579.

amerciament might be stayed, and that the prosecutor might accept of the bail-bond, which was but in 40 / and the profecutor thought it too little. He urged, the theriff was bound by the statute to bail and set him at large, and cannot seize him after the return; he has done all he can, and ought not to be amerced for not doing more than he can. No action lies against him in such case, there ought for the fame reason to be no amercement. The Court agreed, that a bail-bond may be taken on an attachment, but faid they could not oblige the plaintiff to accept the bail-bond, it might be infusficient; if it was, the sherist might thank himself; if it be sufficient, he may by suing the bail-bond, reimburse himself (a).

(a) In Field v. H'orkbouse, Com. 264. the defendant pleaded it was taken by the sheriff on an attachment for contempt of C. B. and void by the stat. 23 Hen. 6., and had judgment. King, Ch. J. said, that upon an attachment of privilege, attachment upon a prohibition, or attachments in process upon a penal statute, the sheriff might take bail, but not upon an attachment for a contempt. In Say v. Ellis, 2Bl. Rep. 9:5. it appearing on over of a bond that the condition was to answer a contempt in the Court of Chancery, the defendant demurred; the Court thought if there was any ground of exception he should

have pleaded facts sufficient to bring the question before the Court, and gave him leave to plead, and judgment was afterwards figned for want of a plea. In Studd v. Allon, 1 Hen. Bl. 468. it was ruled on demurrer that an action cannot be maintained against a sheriff for refusing to take bail upon an attachment out of Chancery for a contempt. The Court did not give an opinion whether the sheriff has a right to take bail. Vide Danby v. Lanufon, Prec. Cb. 110. Eq. Ab. 350. Bland v. Riccard, 3 Leon. 208. Anon. Str. 479. 1 Vent. 231, 2 Vent. 238.

#### [ 6cg ] See 2 Inft. 301. 2 Leon. Cas.

114. 3 Co. 13. Vaugh. 169, 370, 373. Ray. 54, 191, 355, 356.

# Statutes in General, and the Exposition thereof.

1. Rex & Regina versus Barlow.

[5 W. & M. B. R.]

of a public na-Cm. El. 655. 2 Inft. 118.

Where a flattite INDICTMENT on 14 Car. 2. c. 12. against church-directs a thing wardens and overseers, for not making a rate to rain wardens and overfeers, for not making a rate to reimture, may is un. burse the constables. Exception was taken, that the staderitood as fball, tute only puts it in their power to do fo by the word may, Q Cro. Jac. 134 &c. but does not require the doing of it as a duty, for the omission of which they are punishable. Sed non allo-Comb. 220. S.C. catur; for where a statute directs the doing of a thing for

the fake of justice or the public good, the word may is Carth. 293. the fame as the word shall; thus 23 H. 6. fays, the sheriff Skin. 370. Set. may take bail; this is construed, he shall; for he is compellable so to do.

2. Bennet versus Talbot. Hill. 8 Will. 3. B.R. Vide title Declaration, pl. 2. pag. 212.

## Mills versus Wilkins. [Hill. 2 Ann. B. R.]

TRESPASS for taking feveral skins from the plain- Title no part of tiff. The defendant, as an officer, justified on 1 Jac. 2. flatute, but if fet out wrong, is faeap. 22. about tanning, and fet forth the title of the act, tal. Vide 4 Co. mistaking a word, by which it varied from the true title, 48. Cro. Car. and averred the skins were not dressed according to the Cro. Jac. 140. intent of the statute; to which it was demurred, because Ray. 191, 192. Vide Cro. Car. 232. Hard. 324. no such act as is here set forth. 3 Keb. 648. On the other side it was answered, that the Saund. 128. title is no part of the act; that old statutes have no 3 Keb. 461, 642, title, and the opinion of Hale, C. Baron, was cited. Hard. 648. Dyer 324. Hob. 310. 324. Vide Hut. 56. Hob. 310. 11 Co. 33. 4 Inft. 345. Holt, C. J. The title is not a material part, neither is it necessary to set it forth; but yet it is a name given by the makers, and therefore you must describe it accordingly if you will describe it by its title; and they denied the opinion of my Lord Hale, faying, it was a sudden opinion. Judgment for the plaintiff (a).

S. C. 6 Mod. 62. 3 Salk. 331. Holt 662. 2 Hawk. P. C.

(a) It may perhaps appear, that the rule by which a mifrecital of the title, commencement, or provisions of an act of parliament, which it was unnecellary to state, is fatal, should be confined to those cases where the rest of the pleading is so connected by reference with the act described as to be imperfect without such description; and the description being falle, the allegation, of which by reference it forms a material part, cannot be true. But that where the plea is, independent of the recital, perfect and sufficient, a variance in the merely superfluous recital will not be material. Thus, in the report of this case, 6 Mod. 62. Holt, Ch. Jus. said, "You tie your justification to an act fo entitled, and if you cannot produce one you are gone." So in Boyce v. Whitaker, Doug. 94. the

defendant having stated with some variance the stat. 23 H. 6. c. 9 relative to sheriffs bonds, and pleaded that the bond whereon he was fued was taken against the form of the statute aforesaid, the plea was held bad because the word aforesaid tied the party up to an exact recital. In Lutav. 140, it is held that if there is a material variance from a general statute, if the declaration conclude cont. form. stat. in ejusm. cas. edit. and not contra form. flat. pred. it is well. So in Wendbam v. Palgrave, Fort. 372. Str. 214. the declaration recited that by a statute made in a parliament held the 8th day of Jul. 8th Ann. it was enacted, &c. when no fuch parliament was held, and concluded generally cont. form. flat. ejufmod. &c. the Court held that it was well enough; but contrary to the statute aforesaid would tie it up. Accordingly in 2 Hawk. ch. 25. s. 104. it is said, "It seems to be agreed that not only a missecital of the day whereon the parliament was holden, but even a missecital of the purview of a statute, may be salved by a general conclusion contra form. stat. without adding prædist." The case, therefore, feems to stand upon the same foundation as every other where there is an

error in an immaterial allegation, viz. that if the allegation is so connected with what it is material to aver, that the latter is solely referable to it, and would be desective and impersect without it, the error is satal, but otherwise not. As to which, vide Savage v. Smith, 2 Bl. Rep. 1101. Bristow v. Wright, Doug. 664. Gwinnett v. Philips, 3 T. R. 643. and particularly Peppin v. Solemons, 5 T. R. 496.

# [610] Statutes, and the Exposition thereof.

5. C. 1 Show. 241, 266.

1. Hobbs qui tam versus Young.

[Trin. 3 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 129.]

Exerciting & trade by others is within the fat. 5 Eliz. Vide post pl. :, 3, & 7. 3 Mod. 313. S. C. Carth. 62. Comb. 179 Shower 266. 71 Co. 53. b. Cro. Car. 347, 516, 517. 6 Mod. 21. Cro. Car. 516, 517. I Saund. 10. 1Rol. R. 10. Hob. 211. 130. 11 Rep. 54. 1 Sid. 303. Cro. El. 872. Raym. 1179.

DEBT on 5 Eliz. for using the trade of a clothworker, not being brought up an apprentice; upon nil debet the jury found, that the defendant was a Turkey merchant, and exported woollen manufacture into Turkey, and that he employed clothiers that had served apprenticeship to work the clothes in his own house, at his own charge, and with his own materials, which he sent into Turkey as merchandize, but that the desendant never served an apprenticeship. Per Cur. 1st, The desendant is the trader in this case, and the person that exercises the trade, because he employs the rest, who work but as his servants, and the loss and gain is to be his.

2 dly, This is a trading within the statute; because the Hob. 211.
2 Bullt 187.
2 Cro. 347, 349, vended out for the sake of commerce; and whether the trading within the statute; because the Lordon within the statute; because the Hob. 211.
2 Cro. 347, 349, vended out for the sake of commerce; and whether the trading be in England or in Turkey, is not material.

130. 11 Rep. 3dly, That he that hath not served an apprenticeship is 54. 1 Sid. 303. by this statute restrained to work as a trader, either by him-Holt 66. 2 Ld. filf or others; for the intent of this act is to annex the Raym. 1179. benefit of trade to such as underwent the hardship of Vide Raymard v. learning it, thereby to encourage labour in youth. And Chace, 1 Bur. 2. few would undergo the trouble of being apprentices, if they might employ others to work for them.

4thly, This is a negative statute, and no one shall exercise a trade against it, unless by virtue of a custom, as

the

the widows of tradefmen, who by custom carry on the trade of their husbands, which the Court held not within the statute. Hutt. 132. Noy 5. 1 Saund. 312. 2 Bulft. 191. Cro. Car. 516.

#### Dominus Rex versus Paris Slaughter.

[611]

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 513. S. C.]

BRODERICK moved to quash an indictment on Indictment for 5 Eliz. c. 4. for using the trade of a fellmonger, not trade of a fellhaving been an apprentice seven years; he urged, that this monger contrary was a business required no skill, for it was only to pull the to 5 Eliz. not quashed, because wool from the skin. He cited 1 Cro. 499. Information aversed to be a for exercising the trade of a hemp-dresser reversed. One trade at the time Pasch. 4 Jac. 2. for exercising the trade of a wool- of making the comber, quashed. Of a pippin-monger reversed. Sed per and 7. S.C. Holt Holt, C. J. If in the indictment it be averred to be a 68. Cases B. R. trade (a) at the time of making the statute, we will not Raym. 1179. quash it; for whether it was a trade then or no, or whether any skill be requisite to the exercise of it, is matter of fact proper for the trial of a jury: And there are many trades within the general words and equity of that act, besides those that are mentioned therein. The case of a costermonger is not yet determined, and the case of an upholster, 2 Bulft. 186., is not law. The Court would not quash it.

(a) If a trade is mentioned in the flatute, it is not necessary to allege that it was used at that time; 4 Mod. 145. Rex v. Thoms, Bull. N. P. 192.; otherwife it must be averred to be a trade used within the realm of England or

Wales at the time of making the act, ibid. Infra boc regnum is not sufficient, for that extends to Scotland; and averring the trade to be used in Scotland would fignify nothing; Rex v. Lifter, Str. 788. Barnard. B. R. 30.

## Domina Regina versus Harper.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1188. S. C.]

INDICTMENT for using the trade of a merchant- Where the trade taylor contrary to the statute 5 Eliz. Serjeant Broderick is averred to be moved to quash it, because it is not a trade within the sta- time of the act, tute. Quashed nisi. Some days after Mr. Eyre moved to the Court cannot quash an indictment against Cornist, for using the trade intend it not of a seamstress, not having served as an apprentice; and the Court refused, because it was set forth in the indictment to be a trade in England at the time of making the act; wherein the words are, any craft, mystery, or occupation now used. So that if this trade of a seamstress be not

#### 611 Statutes, and the Exposition thereof.

within the act, the defendant would have the advantage of it upon the trial. But as to Harper's case, which Mr. Eyre put them in mind of, the Court seemed to think a merchant-taylor was nonfense and unintelligible; they did not know what a merchant-taylor meant, and so it differed. It is a good exception that it is not averred in the indictment, that the trade therein mentioned was a trade at the time of making the statute. Domina Regina versus Cornifb, eodem terming.

## [612]

#### Billings versus Eads.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1214. S. C.]

man without a licence.

H. may letcoach- T RESPASS and special verdict found; the case was, horsesand coach- a gentleman had a coach and horsess of his arms a gentleman had a coach and barness of his own, and gave an inn-holder 1001. per annum to find him a pair of horses and a coachman: And the question was, Whether he could do this without a license to keep a hackneycoach, upon 5 & 6 W. & M. c. 22. Et per Cur. Though in the beginning of the licensing clause, seet. 3. and in the prohibiting clause, sea. 5. hackney-coach or coackhorses are mentioned in the disjunctive, yet that must be understood of coach-horses to be used with a hackneycoach, because all other provisions in the act, viz. the . number, the fine, the rent, and the whole revenue reserved, is confined to hackney-coaches; and the party cannot forfeit, but where the commissioners may license; and it is an act of restraint.

## Anonymous.

[Mich. 4 Will. 3. B. R.]

Confirmation of the stamp act.

Warrant of attorney for entering up a judgment was written upon a paper, which likewise contained a bond, and had only one stamp, whereas by the act concerning stamp-duties it ought to have two stamps: Judgment was entered up by virtue of this warrant. And now it was moved, that the judgment and execution might be set aside for this cause. Sed per Cur. There may be reason to refuse such a warrant of attorney in evidence, but no reason to make all void; for there is nothing in the act that imports that.

#### Dunn qui tam ver/us Hinchdy.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1275. S. C.]

EBT upon the statute 10 W. 3. c. 2. for twelve dozen Debt fur stat. of buttons, made de ligno tantum in imitation of, &c. 10 W. 3. c. 2. The jury found the buttons were all wood but the shanks, 374 which were brafs, and that they were made in imitation, &c., and that there were buttons made de ligno tantum, &c. Weld said, that now it appeared the statute was applicable, and might have its effect upon other buttons, and that a penal law was to be construed strictly, and not by intendment. Vide 2 Inft. 199. Plo. 47. a. But the Court. resolved they were prohibited by the act; for the shank is no part of the button, but added to fasten it : And if buttons thus made in imitation, &c., by having a brass shank added, should be out of the act, it would be in every body's power to evade it. Adjudged.

#### Domina Regina versus Maddox.

[613]

[Pasch. 5 Ann. B. R.]

PER Cur. Upon indicaments on the statute 5 Eliz. Exposition of in evidence we allow following the trade for feven 5 Eliz. Vide ante pl. 1, 2, wears to be fufficient without any binding, this being a and 3. Cumb. hard law (a). Cited in Regina versus Franklin, 2 Ld. 251, 255. Raym. 1179.

(a) R.ac. French v. Adams, 2 Wilf. 168. Wallen v Holton, 1 Bl. 233. A wife who has affifted her hufband feven years, or a person who has served seven years as a journeyman, may exercise the trade; Show. 242. 3 Keb. 400.

fon may exercise any number of trades in which he has been employed feven years; French v. Adams. R. 4 Leon. 9. that a person who has served an apprenticeship to any trade within the statuto may follow any other trade within it: 12 Med. 401. 10 Med. 70. A per. S. P. Keble 473. Vide Bull. N. P. 192.

Stat. of Winton, 13 E. 1. c. 12. and 27 El. c. 13. Vid. Hale's P. C. 71, 72. Dalt. c. 100. Staund. P.C. 27. 1 And. 116. 2 Sid. 44. z Sid. 139.

# Statutes of hue and Cry.

#### Ascomb versus The Hundred of Spelholm. I.

[Mich. 2 W. & M. B. R. Intr. Hill. ult. Rot. 901.] 1 Leon. 323. S.C. 1 Show. 94, 241. 3 Mod. 287. S. C. called Ashcomb versus the Hundred of Elthorn. Carth. 145. Holt 637.

H. robbed, refusing to take the oath, cannot Servant robbed of his master's goods, mailer infra, & ante 440,441. 2 Saund. 380. called Ashcomb

A N action was brought by the master for the robbery of A. and B. his servants. The jury found the special fue. Vide post matter, and that B. was a Quaker and would not take the pl. 3. 7 Co. 6, 7. oath (a), viz. that he knew none of the robbers. Cur. 1st, The master may sue for the robbery of his servant, and the oath of the fervant is fufficient. 2dly, The may sue. Vide servant may also sue, for he had the possession. 3dly, If the fervant be robbed in the prefence of the master, the master must sue, and the oath of the master is sufficient. S.C. Carth. 145. Sty. 156. But if the servant was robbed out of the masversus the Hun. ter's presence, the servant must swear. 4thly, As to B., died of Elthorn. who refused to swear, the hundred is not liable; for the statute of Eliz. was made in favour of the hundred to prevent confederacy and combination between the thieves and the party robbed, and it was the master's folly to employ fuch a fervant.

(a) By stat. 7 and 8 Will. 3. c. 34. a Quaker's affirmation is of the same effect as an oath, except in criminal cases. The exception has been ruled to extend to an appeal for murder, Castle v. Bambridge, 2 Str. 854.;-a motion for an attachment for non-performance of an award, Rebins v. Sayavard, 1 Str. 441.;—a motion for an information for a misdemeanor, Rex v. Wych, 2 Str. 872.;—articles of the peace, Rex v. Green, 1 Str. 527.;-a rule to answer the matter of an affidavit, 2 Str. 496.; - an affidavit in defence of another against a rule for an information, but not in his own defence, Rex v. Gardiner, 2 Bur. 1117. It does not extend to affidavits concerning the appointment of overseers, Rex v. Tanner, 2 Str. 1219.; or to penal actions, Atchifon v. Everett, Cowp. 382. Vide Espinasse 728.

Vide Style's Rep. 1 56. &c. fupra. I Brownl. 155. 2 Leon. 82.

## Combs versus The Hundred of Bradley.

[Pasch. 5 & 6 W. & M. B. R.]

IN an action against the hundred, the plaintiff declared, that he was possessed ut de bonis suis propriis. Servant robbed of his mafter's that he was possessed ut de bonis suis propriis, &c. an action against jury found the plaintiff was a servant, and was robbed upon the the road of 30 l. of his master's money, and 20 s. of his the hundred. Et per Cur. The action well lies by the servant, own. Et per Cur. The action well lies by the iervant, 333. Comb. for the money is his, and he is possessed ut de bonis propriis 263. Holt 37. against all, and in respect of all but him that hath the very Cases B. R. 54. right. If a servant be robbed of his master's goods, he Comb. 263. may maintain an appeal of robbery.

4 Mod. 303.

#### Dowly versus The Hundred of Odium. 3.

Vide 1 Show. 60.

[Mich. 6 Will. 3. B. R.]

IN an action upon the statute of hue and cry, a verdict Declaration need was for the plaintiff; and Mr. Clark moved in arrest of not fet forth the oath to be taken judgment, that it appeared the oath was taken before a before a justice of justice of peace of the county, and not a justice inhabiting prace of the hua within the hundred, according to 27 Eliz. But the Court pl. 1, 7 Co. 6, held it good notwithstanding that, for the statute of Win- 7. Noy 155.

ton says no such thing, and 27 Eliz. does it only by way

2 Vent. 215.

2 Saund. 413. of direction; and the declaration had been good, though it had not shewn an oath taken before any justice at all,

2 Saund. 413. 3 Saik. 184. Andr. 115.

#### Cowper versus The Hundred of Basingftoke.

[Hill. 1 Ann. B. R. 2 I.d. Raym. 826. S. C.]

N debt on the statute of hue and cry, a special verdict was Assault in the found, that the plaintiff was travelling in the highway hundred of A., in the hundred of Michael-River, where he was fet upon in B., B. is and carried into the hundred of Basing stoke, and robbed in chargeable. See a coppice in the highway of this hundred. The question 2 Cro. 675. March 11. Noy was, Which hundred should be liable? And it was ad52,155. 1 Leon. judged, that the hundred of Basing stoke should, for there pl. 72. 1 Sid. the robbery was committed, and not before; and if these 263,367. 4 Co. had been two counties, it is certain the indictment of rob-bery must have been brought in the latter where the goods 1 Co. 99. were taken, and not in the first where the affault was Hale's P. C. 54-made: Also the hundred is not liable for not preventing Rep. A. Q. 8. the robbery, but for not taking the robbers; for if they are taken, the hundred is excused. Vide Hutt. 125.

Gold/b. 86. It was objected, that the taking, &c. should 1 Hawk. 79, 80. relate to the affault, and so it was a robbery ab initio, like 2 Hawk. 180, relate to the attault, and to it was a robbery as mine, the the case of murder, where it is certain there shall be a re181, 320.
1 Show. 60. lation to the stroke, which was the cause. In answer to 3 Salk. 184. which the Court took this diversity. As to forfeitures 3 Mod. 258, there shall be a relation to the first cause; so if there be a 150, 160, 262, pardon of the stroke, it shall discharge the murder; but 2 Saund. 379, after the stroke, if one knowing thereof receives him, or 300, 423. if a constable arrests him and lets him go, the receiver is

not accessary to selony, nor the constable a selon; for it is not a felony till death ensue. 11 H. 4. 12. b. Otherwise as to collateral purposes; for if the stroke and death are laid at different days, and the indictment concludes, et se murdravit die & loco of the stroke, it is naught; but the day and place of his dying is well. 4 Co. 41. Plowd. 401. But here the affault is not a necessary efficient cause of the robbery, as a stroke in murder is; therefore there is no relation in this case, because no necessity. It was objected, that if one be taken in the hundred of A. and carried into the hundred of B. into a house there, viz. a mansion-house, and robbed, or taken in the day-time in A. and carried to B., and there robbed in the night, there shall be no remedy. And the Court said, those cases were not provided for by the statute. Adjudged per Holt & totam Cur. Also he faid as to the affault's being in the coppice, that it was not necessary the robbery should be in the highway to charge the hundred. And yet see Cro. Car. 267., where it is faid, that the inhabitants are not bound to keep watch in a new highway, or to make amends for a robbery therein com-

Vide S. P. 2 Show. 60. Comb. 1 co. J Goldib. 159 756. 2 Goldib. 280. P. C. 1 Hawk. 202. Cro. Car. 267.

> Who chargeable to the hundred on a hue and cry, vide 2 Saund. 423.

## Sublidies, Taxes, and Culioms.

## Brewster versus Kitchel.

[Hill. o Will. 3. B. R. Vide the state and resolution of this case, title Covenant, pl. 4. pag. 198.]

Holt 175, 669. Different manners of taxing, duced.

Taxes in general I N the debate of this case it was laid down by Holt, means pathan C. J. That the word taxes, generally spoken with remaining a Mod. men ary. c Mod. That the word taxes, generally spoken with re-368.S.C.Comb. ference to a freehold, or where the subject matter will 424, 466. S. C. bear it, shall be intended parliamentary taxes propter excel-1 Salk. 158 S.C. lentiam. 34 H 8. Quinzim. 9. But there be other taxes S.C. Carth. 438. not parliamentary, as repair of churches, commission of 3 Saik. 3:0. not parmamentary, as repair.
Cases B. R. 166. sewers; for any imposition which takes away part of his goods or rent, is a tax. 2 Inft. 532.

The ancient way of taxing was by tenths and afteenths, and when intro- then by subsidies, after that by royal aids; at last by a pound-rate: The former were all on the person or perfonal estate, and were much the same thing; the latter

Was

was upon rents and lands. Tenths and fifteenths were the most ancient. Vide Spelman verbo Quindecima. In 8 Ed. 3. a valuation was made on all the towns in England, and returned into the Exchequer, which became the standing measure for taxing. 2 Inft. 76, 77. From this when a tax was given, the officers of the Exchequer could eafily compute what each town was to be charged with, and what it came to. Vide 11 H. 4. 35, 36. Bro. Quinz. 9.-

The first subsidy was in and by 32 H. 8. cap. 50. which was a tax upon the person for his lands and goods, payable by the party where he lived. This continued till

15 Car. 1.

The affessment or tax, according to a pound-rate, came in 17 Car. 1. In these affessments there was a clause to empower the tenant to deduct. So it was in 1642, 1611, 1649. And then, and upon this account it was, that in conveyances it came to be provided, that there should be no deduction for taxes.

## Trowel versus Ellford.

[Trin. 5 Ann. B.R.]

TRESPASS against the collectors of the land-tax; H. may be affectthe case was, that the plaintiff lived in Middlesex, but ed to the landexercised and sollowed the business of a sactor in Smith- he dwells or carfield; and the question was, Whether the commissioners ries on his onof Middlesex where he lived, could tax him as living in ployment. Middlesex, or he should be taxed by the commissioners of London as following his business in Smithfield? And Holt, C. J. held, That the action lay, and that he was not taxable by the commissioners of Middlesex; for by the very words of the act, he is to be taxed in the place where his office is exercised (a): Cateri Justic. contra, for this is not an office which is local, but an employment which is personal, and the person is taxable where he lives; and the affirmative words of the act are directory. He is taxable in either place.

(a) An excileman who executes his that trespass lay for distraining for it office in different places is chargeable where he resides; and it was ruled v. Weeks, Str. 417.

upon an assessment elsewhere; Barrett

#### Robinson versus Stephens. 3.

[Mich. 8 Ann. In Canc.]

Wherethereshall F one covenants to pay an annuity to J. S. the cove-be deduction for nantor shall not deduct for taxes; for the charge is on taxes of of an nuity, and where the person of the covenantor, and not the landif H. having a term for years, devices an annuity to J. S. and his heirs, there can be no deduction for taxes, for the term for years is no otherwise chargeable with it, than as it is part of the personal estate; for it cannot be said to issue out of the term, when in point of duration it may continue much longer. So if H. grants an annuity to 7. S. and afterwards secures it out of a real estate, there thall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax-free. Per Couper, Lord Chancellor, at his house.

[617]

## 4. Paul versus Shaw.

[Hill. 8 Ann. In Cam. Scace.]

Prisage, an ancient duty on goods, granted away by the able with other duties charged on the same goods while in the grantee's hands. Concerning prilage, vid. Haror, 56, 57, 218, 301, &c. 477. Davis

A SSUMPSIT for 500% received to the use of the plaintiff; on non assumpfit a special verdict was found, that King Charles I. gave to J. S. and his heirs, the duty crown, is charge- of prifage of all wines imported, to hold discharged of all aids and taxes; and the question was, Whether the grantee should pay tonnage for this upon 9 & 10 W. 3.? Note; The duty of tonnage was first imposed per 12 Car. 2. c. 4. viz. 41. 10 s. on all French wine; then comes 1 Jac. 2. c. 3. and imposes 81. per tun on French wine, with a clause, that the grantee of prisage should pay the duty; then comes 7 & 8 W. 3. c. 20. which imposes 25%. per ton; after that comes 9 & fo W. 3. c. 23. which imposes over and above, a duty of 41. 10 s. to be levied according as it was by 12 Car. 2. And it was adjudged in the Exchequer, that the grantee should not pay this duty of tonnage. Upon this error was brought; and it was faid for the grantce, that this was an ancient royal revenue, that if the crown now held it, tonnage could not be due, the queen could not pay a duty of tonnage out of her own prisage; that the grantee claimed under the crown, and ought to have the same privilege and exemption, the rather because it was granted with this immunity. But per Trevor, C. J. and seven other judges in the Exchequer-chamber, it was answered and resolved, that immediately on importation, this duty of tonnage at-

#### Surrender.

tached upon the wine, and the grantee receives whatever part he takes for prisage charged with the duty; and this must be presumed to be the intent of the law; for it cannot be imagined the law meant to raise this duty on the people to enrich a private man, which would be the effect, if he may have his prifage custom-free. And the grantee paid the tonnage imposed by all former

As to the reasons on the other side, they answered, If the prifage had remained in the crown, it could not have paid by reason of the unity of possession, it being absurd, that the queen should be chargeable with a duty to herself; but this exemption is only personal, and the duty revives when prisage comes to a subject, who may pay the duty to the crown, as where a parson leases his glebe. And as to the covenants or clause of discharge in the grant, that could only extend to the tonnage then in being, which he, though king, had himself, and not to what he had not, but might be given to his successors. And the judgment was reversed.

N. This judgment of reversal was affirmed in Dom. Proc. 1 Bro. P. C. 323.

## Surrender.

[618] Post 620, 621.

In the Case of Thompson and Leach. Hill. S.C. 3 Lev. 284. 9 Will. 3. B. R. (Which fee, title Re- &c. Ante 576, mainder, pl. 2.)

THE Court held, that a furrender immediately divests Surrender vests the estate out of the surrenderor, and vests it in furrenderee withthe furrenderee; for this is a conveyance at common law, out his express to the persection of which no other act is requisite, but acceptance. the bare grant; and though it be true that every grant S. C. Cases in is a contract, and there must be an actus contra actum, or Parl. 150. Show. a mutual consent; yet that consent is implied; a gift im-206. Co. Lit. ports a benefit, and an affampfit to take a benefit may well Eq. Ab. 178. p. 3. be presumed; and there is the same reason why a surren- 3 D. 164. p. 13. der should vest the estate before notice or agreement, as 3 Salk. 300. why a grant of goods should vest a property, or sealing Comb 438,468. of a bond to another in his absence, should be the obligee's Carth. 211, 250, bond

435. Holt 357, bond immediately without notice (a). 2 Vent. 198. 3 Le-Cases B. R. 475. vinz 284. 2 Shower 196, 308. See 3 Lev. 285. That the judgment in the principal case was reversed in the House of Peers, in 1692 (b).

(a) Vide ante 301. Taylor v. Horde, 1 Bur. 125.

(6) The judgment which was reversed in 1692 was in a former cause between the same parties; in which it was ruled in C. B., Trin. 2 W. & M.

of acceptance. The reversal of those decisions was on the 23d Dec. 1692, Journ. of the House of Lords, vol. 15th, pa. 163, by which the doctrine in the text was established. The cause which was decided 9 W. 3. was relative to the 3 Lev. 294. 2 Vent. 198. and on error fame surrender, but turned upon a dif-in B.R. Hil. 3 W. & M. 3 Mod. 296., ferent point; as to which, wide the that the surrender was void for want reports ante 427, 576.

[610] Vide ante 570.

## Tail.

S.C. I Saik. 338. 1 Show. 370. 4 Mod. 1. S.C. Farell. 18. Holt 615. Rep. A. Q. 19. 3 D. 198. p. 10, 11.

Symonds versus Cadmore. Hill. 4 & 5 W. & M. B.R. Rot. 743. Vide this Case, title Fines, pl. 3. pag. 338.

## Machil versus Clark.

Trin. 1 Ann. B. R. Intr. in B. R. Pasch. 12 Will 3. Rot. 342. 2 Ld. Raym. 778. S. C. Comyns 119. S. C.]

nant in tail to tail, is void; because the ren.a nder is to &c. 2 Lev. 75, 213, 225. 2 Mod. 207. 1 Vent. 372.

Covenant by te- TENANT in tail covenanted to stand seised to the use of himself for life, remainder to John his eldest rana tened to the use of him fon in tail, and afterwards suffered a common recovery self for life, re- with single voucher, wherein he was tenant to the premainder to A. in cipe: And the first question was, What operation the covenant had? For if it made any alteration in the estatetail, the recovery did not bar; and if it did not, the retake effect after covery and fingle voucher did bar. The Court held the 1 Mod. 98, 121, recovery good, and affirmed the judgment; and Holt, C. J. 150, 175. 3 Lev. delivered the opinion of the Court, and gave the reasons 120, 306, 307, for it, the sum of which was,

1st, That if tenant in tail by covenants to stand seised, 7 Mcd. 22, 23, 23. or by lease and release, or bargain and sale, conveys to another and his heirs, it is a base see, not determined nor deter-

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determinable till the entry of the issue; for before the statute de donis, he had a fee-simple; and the statute does not alter the nature of the estate, but restrain the power of alienation; and therefore as he might before the statute, so he may since; the statute only makes it voidable(a).

adly, He has the whole estate in him, and therefore Bargainee of temust be able to divest it, and so he said was Seymour's nant in tail has case in point, viz. Tenant in tail bargained and sold, the estate. bargainee has a descendible fee. This case he held for law, butdenied the case of Took and Glascow, I Saund. 260.

and likewise Litt. § 612. if it be taken literally.

3dly, This appears from 3 Coke 84, 613. If tenant in tail What conveygrants a rent, advowson, &c. it is not void as to their iffues, in tail are debut voidable; for if he brought a formedon, the defendant featible by the may plead a warranty. Vide Winch. 5. Bridg. 77. But this entry of the issue is still more apparent from the common case, where tenant in tail makes a lease not warranted by the statute, it is not void as to the issue, but voidable; and tenant in tail may exchange with a tenant in fee, in which case a fee is given and taken without livery: Ergo, tenant in tail may also by covenant to stand seised. If tenant in tail by leafe and releafe, by bargain and fale, or by covenant to fland seised, convey to another and his heirs, the estatetail is not in abeyance, but in the alienees, for the law puts nothing in abeyance, but of necessity; and it is not in the tenant in tail; for he cannot bring waste, &c. Hob. 339. Yelv. 51. 1 Leon. 110. 1 And. 191. 3 Cro. 895. But he held that the present conveyance did produce no alteration in the estate-tail, because the estate in remainder was to commence after his death; and took this difference.

If tenant in tail make a future lease for years, which 1Rol. 842. I. 50. by possibility may be to commence during the life of te- 843. L. 15. Plowd. 437. nant in tail, it is not void, but voidable as to the iffue.

But if it be a future lease to commence after the death of tenant in tail, it is merely void in its creation; for it is not to commence till the title of the iffue commences, and that is an elder title concurring with it; and if the law 1 Sid 261. should make it otherwise than void, the law would make Carth. 257. him a trespasser. Vide Dy. 279. pl. 7. 2 Cro. 565.

So in covenant, if one covenant to stand seised to the use Tenant is wil of A. and his heirs, or to the use of A. for life, remainder covenants to fland seised to to B. in fee, the covenant is not void, but puts the the use of A.

estate-tail out of the covenantor.

(a) R. ac. Goodright ex dem. Tyrrell n. Co. Lit. 326. b. 331. a. Plowd. 557, v. Mead and Sheljon, 3 Bur. 1703. Vide Wright's Ten. 186. ac. Stapelton v. Stapelton, 1 Atk. 2. Butl.

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But if tenant in tail covenant to stand feiled to the use of A. and his heirs after his death, it is void. tail; otherwise if the new use be to take effect after his death.

2Rol. 790. L 37. So it is in the case at bar, tenant in tail covenants to fland feifed to the use of himself for life, remainder to J. S. and his heirs; for the remainder is to take effect after his death, when by his death the title of the issue commences, and the covenant as to the estate for life to himself is void in this case, because here is no transmutation of possession; such covenant is in any case only good in respect of the remainders, and since the remainders are void, the covenant and the first estate are likewise void.

## Idle versus Coke.

[Pafeh. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 1 P. Wms. 70.

der to A. and his wife for their and for default of fuch iffue to A. and his beirs.

Surrender to A. Seised in see of a copyhold, surrendered the same to for life, remainthe use of himself for life, and after that to Valentine his fon and Alice his wife, pro & durante termino viterum suarum naturalium & bered. & assignat. predist. Vabeirrand affigne; lentini & Alice. Et pro defectu talus exitus, to the use of himself and his heirs. And it was held per totam Curion,

is a fee in A. and his wife. S. C. 3 D. 186. pl. 14. Rep. A. Q. 57. Hok 164.

Vide ante 6:8. seader to be conftrued as a conveyance at rommon law-[621]

\* 1st, That a limitation of uses in a copyhold surrender must be construed by the same rules and in the same manner as if it were a limitation in a deed of feoffment, or any other conveyance at common law (a); and that the intent of the party is not fufficient as in a will, for the statute 32 H. 8. leaves the testator at liberty to express his intent as he pleases; but the common law ties up conveyances to let form and let words.

In a gift in tail what body the

2dly, In a gift in tail it must be limited of what body it must appear of the iffue is to come, so as it may appear by the express iffice are to come. words, or fomething tantamount or equivalent; and therefore a gift to H. and his heirs males, or a gift to H. and his heirs females, is not an estate-tail; because it is not

cases of Sutton v. Legele, 2 Ath 101. case of surrenders) there was a differ-Lovell v. Lovell, 3 4th. 11. In Fisher ence between words of regulation or majority of the judges held, that a furrender might be construed as a will in Rigden v. Kallier, 2 Vez. 252., Lord Vide Morgan v. Griffiths, Cours. 234. Hardwicks thought that upon a cove-

(a) This point is recognized in the nant to stand seised (and come semble in v, Wigg, ante 391., 1 P. Wms. 14., the modification of the effate, and words of limitation.

The limitation in this case would in creating a tenancy in common. In a will have clearly been an efface-tail.

and the as the stage of faid.

Bid, nor does it appear of whose body they are to iffue. At common law this would not have been a fee-conditional; and the statute de donis does not create estates-tail, but preserves them: A fee at common law was either absolute or restrained; those restrained sees were either restrained as to duration, as a gift to A. and his heirs, while such a house stood, &c., which was a base see; or restrained as to what particular heirs, or of whose body issuing should inherit, which was a fee-conditional, and is by the statute Fee absolute turned into an estate-tail; ergo this is a fee-simple at comrumed into an estate-tail; ergo this is a see-simple at comconditional.

From law, and is so at this day; for there are words to a Bi. Com. 104create an estate of inheritance, but none to restrain that to iffue or heirs to the body of the party: But a gift to a man and the heirs males of his body, is an estate-tail; so is an estate to husband and wife, & baredibus de ipsis pro- By what words creatis, for de ipsis is tantamount; so if a gift be to H. and util may be his heirs, if he have issue of his body; and if he die with Co. Lit. 20. out heirs of his body, the remainder to himself and his 10 Co. 870 heirs; for here is an inheritance created, and it is manifest Moor Cas. 9400 he meant heirs of his body, & voluntas donatoris in charta Carth. 343. doni sui maniseste expressa de catero observetur, and this is a 5 Mod. 267. Jenk. 171. 5 H. 6. 6. So if a 3 Lav. 70. necessary implication. gift be to A. & heredibus suis si heredes de carne sua habuerit, Plont. 141. 20 Is so sullos beredes de carne sua babuerit, remainder to the donor: So if lands be given to A. [and bis beirs] & fi contingat ipsum obire sine beredibus de corpore suo, remainder to the donor, is an estate-tail, per Helt, C. J. though not given

to him and his heirs. Quere. 3dly, They agreed Beresford's case, vis. a scoffment to To B. and the the use of A. for life, remainder to B. and the heirs males heir males of of the faid B. lawfully begotten, and for want of fuch iffue the faid B. lawfully begotten, to fife to be an effected in the faily begotten. lawfully begotten, to, &c. to be an estate-tail; for of the and for de faid B. is de dicto B., or ex dicto B., which is sufficient to be over is tail. denote ex quo corpore; so if it were in Latin, remanere presditt. B., & haredibus de dicto B., or en dicto B. But if it were in Latin remanere dicto B. & heredibus suis, or heredibus ipsius & pro desectu talis exitus, remainder over, it had

been no estate-tail.

4thly, It was agreed per Holt, C. J. Powys and Powell, Justices, that Valentine and Alice had a fee-simple, and not an estate-tail, because the words, & pro defectu talis exitus import nothing of their dying without issue; it is not said pro defectu talis exitus de corporibus dict. Valentini & Alicie or de pradict. Valentino & Alicia, but generally, whereas every heir is the issue of somebody. If there had been particular words expressed, as if they die without heirs of their two bodies, there might be reason to turn the express estate of fee-simple raised into tail, which cannot be altered upon a BL Com. 115. bare implication, the rather in this case, because of the word affigns; for an estate-tail is not an assignable estate.

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7 Co. 40. Litt. Rep. 344. 1 Cro. 363. 3 Cro. 478. Plowdi 541. 3 Leon. 5. Hob. 32, 37. Aff. 15. 1 Cro. 366. 2 Sid. 41. Gould, J. contra, because the intent of the party was Of equal to de or to create an estate-tail; and the word of in English is equal and tantamount to de or ex in Latin.

ex in Latin.

Vide 5 Co. 114, 115. 8Co. 147. Lit. Rep. 33, 34. 2 Inft. 107. 1 Lev. 44. 2 Cro. 627.

Dyer 300.

# Tender and Refusal, Amends,

## Giles versus Hart.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 254. S. C.]

To a general af-fumplit, tender and refusal must 2 Lev. 209. 146, 277, 440. 1 Show. 129, 130. Comb. 442,334-322. S. C. Comb. 443. Carth. 413. 3 Salk. 343. Hole 556. Cafes B. R. 152.

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B. C. Carth. 413. In pleading tender in debt, defendant prays judgment de de ulterioribus dampnis.

INDEBITATUS affumplit and quantum mervit, and that being requested at such a day and place, the debe elealed with a fendant refused to pay. The defendant pleaded, that at tout semps prist, such a day, before the request, he tendered, and the plainwhich cannot be after imparlance. tiff refused; and that afterwards he was always ready, and tenders the money into Court. Plaintiff demurred, because 3 Lev. 24, 103, the defendant had imparted, and because it is not pleadable in an affumpfit, and because here was no answer to the special request. Et per Holt, C. J. Where the agreement is Ven to pay at a certain time, tender at that time, and always ready, is a good plea; but where the money is due and payable immediately by the agreement, the party must plead tout temps prist from the time of the promise: But this cannot be after imparlance (a); for by that it appears he was not always ready; otherwife if no imparlance, then he might have pleaded tout temps prist notwithstanding the special request laid in the declaration, because it was immaterially alleged there; so in debt, though the plaintiff lay a special request, the defendant may plead semper parazus, and pray judgment de dampnis: And the plaintiff may reply a special request to shew the defendant was not always ready: So in the principal case: Yet there is a difference between debt and assumpsit; for in debt the dudamnis; in case, mages are but accessary, but in assumplet, are the principal: Therefore in debt, the defendant may plead in bar of the damages; but in assumpsit the defendant ought to plead always ready, with a profest in cur., and demand judgment de ulterioribus dampnis.

(a) Fi. Clift. 203. Lut. 227. Forte. that a tender may be pleaded after a 376. Barnes 343,354. R. H. Bl. 369. judge's under for time.

## Sweatland versus Squire.

[Hill. 10 Will. 3. B. R.]

7 ND EBITATUS assumptit: The defendant plead-ed, that before the action, vis. such a day, he tendered 368. Comb. the fum of so much money, and that he was always after 443, 444. ready, and now is ready, and prays judgment de dampnis. Plaintiff demurred. Et per Cur. It is not enough that he was always ready fince the tender; the money was due before, and the neglect of payment was a delay, a breach of contract and a cause of action; now here is no damages for that, but those damages and all that part of time remains unanswered, in respect of which the plaintiff ought to have judgment. Note; The counsel for the defendant said, that interest was due for the time unanswered, and damages would be recovered in respect of that interest. Quod fuit negatum per Powell, J. Interest is recovered by Interest not reway of damages where damages are recovered ratione detentionis debiti; but not where damages only are recovered, recovered. for interest is not recovered occasione dampnorum. ment pro quer,

368. Comb.

## Lancashire versus Killingworth.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 686. S. C. Comyns 116. S.C.]

Covenants at two days notice to accept 1000 l. stock When both at any time within twelve months, and to pay 2000 l. parties meet, refusal most on the transfer; and the plaintiff shews, that on the second shewn. I Saun day of November he gave the defendant notice he would be 320. 2 Saund. at the place the fourth, and that he was there, & obtulit, 350. Lutw. 568. S. C. and that the defendant was there. Per Cur. When both parties meet at the time and place, he that pleads a tender must also plead a refusal; otherwise such a plea is naught [Sayer 189.] on demurrer, but good after verdict; and if the defendant 1 Str. 535. be absent, he must shew that, and also that he was at the Doug. 730. time and place, and tendered. Fide 1 Sid. 31. 17 or 7 E. 3. 11. 2 Saund. 350. Peters and Opie.

\* 2dly, He that pleads a tender at the time and place, and If one comes not, no one there to receive, must shew at what time of the the pleader must day he was there, and how long he staid; for he ought came, and how to shew that he has done all that could be done on his long he staid. part to accomplish what by his agreement he was bound

to do (a). 6 Ca. 114. Yelv. 38. 2 Cro. 13.

refulal must be 3 Salk. 344. Cales B. R. 51

(a) Vide ac. Str. 544, 777. 3 Bro. P. G. 92.

## Cerm-time, and Computation.

Muft flav till fun-let, unkli special circumflances fnewh wary it. Vide s lnft. 107. \$ Co. 147.

adly, The last part of the day is the time the law appoints for a tender, but it must be time enough before sunlet for transacting the matter which is tendered: Yet in the case at bar, wherein there could be no transfer, but at the hours of the company, i.e. from ten to twelve, &c., the plaintiff must aver the usage of the company, and shew that he came accordingly and staid so long.

Ante 514. Post 650. 1 Lev. Term-time, and Computation. 176, 196.

#### I. Anonymous.

[Mich. 10 Will. 3. B. R.]

DER Holt, C. J. Mr. Justice Twysden used to cite the book of E 4., and fay, they were to hear no law the last day of a term.

## Asmole versus Serjeant Goodwin.

[Trin, 11 Will. 3. B. R.]

for all to be done out of pl. 6. 6 Mod. 343. 8 Mod. 21. 3 Burr. 5 T. R. 642. 4 T. R. 557.

Sundays and ho- CASE against the custor brevium, the declaration was lidays computed delivered on Friday morning, and rules given to plead for acts to be within four days, whereas Holidays and Sundays were not or. Vide post juridical days. Et per Cur. We reckon them non juridici as to matters to be transacted in court, and therefore Samdays and bolidays are no days to move in arrest of judgment. H. Bi 9. But as to businessdone out of court, as rules to plead within four days, &c., Sundays are reckoned the same with other

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## 3. Sir Robert Howard's Cafe.

[Trin. 11 Will. 3. B. R. At the Sittings at Guildhall.]

InformeeofH.'s A Policy of affurance was made to infure the life of Sir life for a year.

Robert Howard for one year, from the day of the date a day: Infiler thereof; the policy was dated on the 3d day of September Vide 1697. Sir Robert died on the 3d day of September 1698, ante 413. 5 Rep. about one o'clock in the morning. Et per Holt, C. J. Ind 1. b. 3 Lev. 438. 5 Co. 1, an action hereupon it was ruled at the fittings at Guildball, 1st, That from the day of the date excludes the day, but from

## Cerm-time, and Computation.

from the date includes it, so that the day of the date is ex- 2 Bulf. 83, 305. cluded. 2dly, That the law makes no fraction in a day, S.C. Holt 195, 2. Mod. 281. wet in this case he dying after the commencement, and be- Hob. 139. fore the end of the last day, the insurer is liable, because the infurance is for a year, and the year is not complete till the day be over: Yet if A. be born on the third day of September, and on the second day of September twenty-one years afterwards he makes his will, this is a good will; for the law will make no fraction of a day, and by confequence he was of age.

## Allen versus Brookbank.

[Trin. 11 Will. 3. B. R.]

T PON a libel in the Spiritual Court for incontinency, Citation may be the citation was ferved on the Sunday, and fixed on the ferved by fixing the citation was terved on the aumany, and fixed on the church-door, and that was objected to be void, because it door on Sunday, is a process. Vide 22 Car. 2. Holt, C. J. That statute ex- 5 Mod. 450-tends not to this process, nor to summons at the church; Carth. 504but only to such process which may as well be executed at any other time.

## 5. Lord Bellamont's Cafe.

[Pasch, 12 Will. 2. B. R.]

HE attorney-general moved for a trial at bar last Trial at bar last paper-day in the term, in an action against the governor of New-York, for matter done by him as governor (a); and granted, because the king desended it.

(a) Vide Cosup. 161.

## Sir Christopher Hales versus Owen.

[Trin. 2 Ann. B. R.]

SUNDAY is not included in the four days to move in quadry upt it arrest of judgment, but the defendant must have four four days to juridical days. Vide peft 627. 6 Med. 2524 ante pl. 2. (b) more in wre

#### (b) D. M. 4 Bur. 21505

Note; Bail may apprehend his principal on a Sunday. Judge Mencouse's MS. Mich. 3 Ann.

## Parker versus Sir William Moor

Mil. 2 Ann. B. R. 2 Ld. Raym. 1028. S. C.]

H. may be taken ONE was taken on a Sunday by virtue of an escape-on an escape-warrant, and it was held good; for one may take anwarrant on Sun- other on a Sunday upon fresh pursuit, and this is in the 6 Mod. 95, 21, nature of it, though it be by a new method, for this is no 22, 63, 96, 154, original process, but the party is in still upon the old com254, 5 Mod. 95, mitment continued down (a). 450. - 3 Salk. mit 148. Bl. Rep. 1273.

(a) Vide note to Wilson v. Tucker, execution on a Sunday. Ricx v. Myers, 1 Salk. 78., and add, that a defendant 1 T. R. 265. in a penal action cannot be taken in

S.C. 6 Mod. 148, 159, 196. Holt 761.

## Harvy versus Broad.

[Pafch. 3-Ann. B. R.]

Tres Trin. on inquiry then returnable, exe. cuted Monday, error. 1 Jon. 301. Et per Cur., Court takes judicial notice of time. Vide 6 Moz. 41, 81, 148, 160, 252, &c. 1 Leon. 242. & infia. Mod. Cafet 159. 1 Jon. 301. Mod. Caies 41, 81, 160, 251. Jon. 428. Cro. Eliz. 227. Cro. Car. 53. N. 5 Rep. Gage's c. not amended, but reupried. Moor 571.

Writ of inquiry was returnable tres Trin., which was Tres Trin. on Sunday, writ of Sunday, and the writ was executed on the 14th, and that was Monday, which was kept as the effin-day, but was a day after tres Trin. A writ of error was brought,

1st, A writ may be executed the day it is returnable (b), computation of but not after. 2dly, The Court may take notice of this judicially, and there needs no writ of error, and no affignment of this for error on the record. So, 5 Co. 45,, \* the Court took notice that the teste of the writ of covenant was after the return. Vide Co. Ent. 250. Mo. 571., and S.C. a Keb. 59. Plowden, Fish, and Brocket's case, the Court took notice the proclamation of a fine was on a Sunday. 3dly, There was no difference between moveable and immoveable feafts; for the moveable calculation for Easter was made by the council of Nice, but received in England and made part of the kalendar, which is established by the law of England: Therefore, whether the feast be moveable or immoveable, or whether the computation is by the day of the month or the day of the week, viz. die Lune prox. post tres, &c., as it is in judicial proceedings, we have the same law and the same rule, and the Court cannot but see and take notice of what appears to them. Vide I Cro. 53. I Lev. 196. 1 Sid. 301. Plowd. 205, 266. b. Ro. 524. Dy. 181. pl. 52. 21 H. 6. 13. pl. 4. 3 Cro. 227. Lat. 118. 2 Cro. 506, 548. 1 Jon. 301. Stat. de Anno Bissextili. Harvey versus Broad. The judgment was reversed (A).

(c) Vide ac. Str. 811. Vide Str. (5) R. ac. 2 Ld. Raym. 1449. Bur. 8:2. 2 Wilf. 372.

#### Traverle.

## Davies versus Salter. [Mich. 3 Ann. B, R.]

S. C. 6 Mod. 250,&c. 3 Salk,

Writ of inquiry was returnable tres septiman. Trin., Same point, which was Sunday the 13th of June, and the writ ap
1 Mod. 402.

peared to be executed the 14th of June. Judgment pro 6 Mod. 41, 81, quer., and error brought; and Eyre urged, that the Court 160, 196. could not take notice of the days of the month. 1 Cro. 275. Yelv. 140. 1 Ro. Abr. 595. Sed non allocatur; thus he urged, that Sunday ought not to be reckoned, but Monday 1 Jon. 300. in lieu of it. Vide Br, c. 5. 2 Cro. 16. 1 Cro. 11. Et per 1 Danv. 683. in lieu of it. Nide Br, c. 5. 2 Cro. 10. 1 Cro. 11. Es per 2 Dany. 254. Holt, C, J. If Sunday happen to be the 4to die post, the hold- 6 Mod. 41, 81, ing of the term must of necessity go over till Monday. So 160, 196. if Sunday happens to be the essential . And as to the re- 1 Inst. 135. lation of judgment, where the effoin-day is a Sunday, the judgment can only relate to the first judicial day. All quinden. Octab. &c. are inclusive : Here we enter die Luna, &c., and that is inclusive. In C. B. they enter a die Lune, &c., and yet that is inclusive too: But in the prin- Aute 415, 623. cipal case there is no necessity; the writ might have been executed fooner, or returned at another day.

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## Traverse.

## Young versus Ruddle.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 60. S. C.]

ASSUMPSIT and quantum meruit: The defendant Aftempsit, satispleaded he gave the plaintiff a beaver-hat in satisfac-issue taken upon tion of the promises, and the plaintiff accepted it in satisf- the acceptance faction: The plaintiff, protestando that he did not give it in good 5 Mod. 86. fatisfaction, traverses, that he accented it in fatisfaction S. C. called satisfaction, traverses, that he accepted it in satisfaction; Young v. Rudd. to which it was demurred. 1st, It was urged, that this Carth. S. C. could not be pleaded in fatisfaction of the promifes, but 347., called Young v. Rudd. fhould have been of the damages, like Neal's case, Yel. 192. 5 Rep. Pannell's In debt upon an obligation, the defendant pleaded a load case. Mo. 678. Sty. 239. of lime given in satisfaction of the obligation, and it was 678. Sty. 239. Cro. held no plea; for it ought to be pleaded in bar of the mo- El. 68, 193. ney due by the condition. Sed per Cur. A release of the Comb. 346. condition would have been no bar to debt on the obliga- Cales B. R. 85. tion; but a release of the promise in the case at bar had

Vide Lutw. 107) 108, 1359. 2 Cro. 221. 1 Saund, 38. Raym. 467.

#### Traverle.

Vide Str. 23. 7 Wilf- 338.

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been a good plea. 2dly, It was urged, that this traverse was naught; for if the gift in fatisfaction be admitted, his acceptance will not be material. Et per Holt, C. J. The acceptance is material as well as the gift; to plead a gift without shewing the other received it, would be naught (a); either is traversable. Vide Hob, 178. Et per Rokeby, J. The gift is neither admitted nor confessed in this case by the plaintiff, because there is a protestando to the gift; to that it doth not appear here was any receipt at all.

(a) R. ac. Str. 573.

## Pullen versus Benson.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 349. S. C.]

Non antea held no traverse where further matter must be diffelosed before to the country. 264. Holt 558.

Com. Pleader, G. 12, 13.

N debt on a bond, the plaintiff declared, quod def. 30 die Novembr. concessit se teneri, &c., & profert in cur. scriptum predict. geren. dat. eisdem die & anno. Defendant pleads, that it was first delivered 30 die Novembr. & non antea, and he can conclude shews the writ, on which he was in custody, was returnable quinden. Martini, so that the bond was taken after the Cro. El. 439, able quinden. Martini, so that the bond was taken after the 443. I Leon. return of the writ; and then relies on the statute of H. 6. 95. Cas. 123. The plaintiff demurred and had judgment; and the Court 8.C. Cass B. B. agreed, that mere matter of supposal is not traversable in the court traversable. agreed, that mere matter of supposal is not traversable, no more is matter alleged out of due time, no more is matter immaterially alleged: But they held the 20th day of November an express allegation; and that the defendant's plea had made it material; for the validity of the bond turned wholly upon the day of the delivery; upon which reason the defendant should have traversed its delivery on the 20th (a). And the Court held the non antea was no traverse, because it is that which cannot be rested upon; but the party must disclose farther matter before he comes to conclude. Cited Yelv. 138. 2 Cro. 263. 5 H. 7. 26, Vide Sand. 21. 2 Keb. 108. 1 Sid. 300. Yelv. 31. But Holt, C. J. said, that that case of H. 7. came not up to this case.

(a) Vide Kel. 229. Beverly v. Pim, 7 Mod. 16. Benjamin v. Howell, 1 Wilf. 81. 20 Fin. 342. 4 Bac. Ab. 79.

2 Mod. 68.

## 3. Chance versus Weeden,

[Mich. 13 Will. 3. B. R. 1 Ld. Raym. 700., named Chauncey v. Winde.]

De injuria fua. TRESPASS for 200 bushels of salt: The defendant proprie is a good fets forth the act for laying a duty on salt 10 W. 3.9 replication to a justification by that it was put on board to be exported, not being weighed,

Uc., that he was an officer, Uc., and seised it; the plains the common law tiff replied de injuria sua propria absq; tali causa; the detute. Vide fendant demurred. Et per Holt, C. J. Where the de- 1 Lev. 307, fendant justifies by virtue of an authority by the common 308. 3 Lev. 48. law, as a constable by arrest for breaking of the peace, un- Com. Pleaser, der process of the admiralty, &c., de injurio sua propria is F. 18. 2 Leve a good replication; so it is, and by the same reason, when 11, 12. 3 Lev. one justifies by an authority of an act of parliament; for 41. S. C. Holt being a general law, the statute can be no part of the issue. 580. Vide Vide 16 H. 7. 2. E H. 7. 6. Ca Ford 6. 2. A 10.00 Sec. 10.00 Vide 16 H. 7. 2. 5 H. 7. 6. Co. Ent. 643. A justifica- 4 Leon. 26. tion upon the statute de malefactoribus in parcis, and a like replication: As for the case in Crogat's case of waste, and enter pur view, Holt, C. J. said it stood on a particular reason. Also the Court held the plea ill, because it was not showed what fort of falt this was, bay-falt, pit-falt, white-falt, &c., for the statute does not extend to all. Judgment pro quer.

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## Haywood versus Davies & al.

[Mich. 1 Ann. B. R. Vide this Cafe, title Abatement, pl. 10. pag. 4. (a)]

HERE a traverse ought to conclude to the country, and where with an averment.

(a) To the authorities there referred to add Hadges v. Sandon, 2 T. R. 432.

## White versus Bodinam.

[Pasch. 3 Ann. B. R.]

ESSEE for years brings covenant against the leffor, Absque hoc, that declaring upon a demile and covenant for quiet en-joyment, and affigns for breach, that the leffor did enter every part. upon him and out him of the premises. The desendant a Mod. 68. pleads, that he entered to diffrain for rent-arrear, abfque 3 Lev 113,227.

boc, that he outled him de premiss. To which the plain
itiff demurred, thinking the traverse ill; because if he 3 Co. 1. 8 Co.

outled him of any part of the premises, he had a good 177.

Inst. 282. cause of action, therefore he should have traversed, absq; Yelv. 30. boc, that he ousted him of the premises, or of any part thereof (b). But, per Cur. The plea is well enough in this tyent. 2726 case; for if the plaintiff will join issue upon the matter of S. C. 6 Mod. the traverse, and prove the ouster of any part, the issue 150. , shall be for him: And the Court took a diversity between.

(b) Vide Collorne v. Stockdale, Str. 694. 8 Mod. 58. . .

pleading

pleading the general iffue, as in debt, you must plead men debet nee aliquam inde parcellam, and a special iffue, as this is. 3 Cro. 83, 84. Dyer 115. Judgment for the defendant,

Latw. 1624, 1625. Quer, 6 Co. 24.

## 6. Gilbert versus Parker.

[Paich. 3 Ann. B. R.]

Upon pleading a feifin generally, traves fe may be taken that he is fole seifed. Vide ante 562. 5 Mod. 350. Cro. El. 372, 785. 2 Saund. 295. 9 Co. 66, 112. Mod. Caf. 158. 8. C.

2 Mod. 60. Yelv. 140.

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# Co. 89. Lutw. 1177, 1316. Ante 580, 583. 1 Lev. 104.

....

N replevin for taking cattle, the defendant made conufance, that A. his mafter was seised of the locus in quo. and per ejus pracept. he took them damage-feasant. Plaintiff replied, that he was seised of one third part, and put in his cattle, absq; boc, that the said A. was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, &c, When the defendant pleads his master was seised in see of the place where, &c., that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; and therefore, though a seisin in see is only alleged generally, yet that being intended a fole feifin, the plaintiff may traverse, absque boc, that he is sole feifed; fince the plaintiff makes himself tenant in common with the defendant, it had not been enough to fay, that he is tenant in common, without traverling the fole seifin.

2dly, The Court held he might either traverse, absq. hoc, that he was sole seised, or that he was seised mode forma. Hob. 119. 3 Cro. 795. Winch. 7. 2 Mod. 6. Dyer 280., of which the Court doubted, but said there might be difference between parceners and tenants in common who are seised per my & per tout. Vide 1 E. 4. 9. 2 Vent. 228. Hutt. 120. Hob. 72. Mo. 863. 37 H. 6. 31. Kel. 27. 1 Leon. 78. 32 H. 6. 2, 6. 21 E. 4. 65.

## Trealon.

See 2 Hawk. P. C. cap. 17. 11, &c. Kely. Rep. 2, 3, 4, 80.

## Rex & Regina versus Geary.

[Mich. 1 W. & M. B. R.]

EARY was attainted of high treason on an indict. Attainder of ment, to which he pleaded guilty. Upon a writ of treason reversed error brought to reverse this attainder, the exception taken allocatus before was, that it did not appear he was asked what he had to judgment. Vide fay why judgment should not be given against him; and 1 Show. 131. all the precedents are with an allocutus quid, or si quid pro fe dicere habeat, &c. Vide Plowd. 387. Co. Ent. 532. Raft. 455. And the Court held the exception good, for he might have matter to move in arrest of judgment, or a pardon; and the attainder was reversed.

ante 576. S. C.

## Tucker's Cafe.

[Pasch. 5 & 6 W. & M. B. R. 1 Ld. Raym. 1. S. C.]

S. C. Show. P. C. 186. & vide it. 612.

REGINALD Tucker brought a writ of error to re- Judgment in treation rever verse an attainder of high treasion, upon an indicament against him for the rebellion in Monmouth's time. The indictment was, that the defendant and another, ligeantia fue \* debitum minime ponderan., did traitorously wage war against the king verum & naturalem dominum suum contra pacem, &c.

It was held, 1st, That the want of the words, contra ligeantia sua debitum, supposing them to be necessary, were not supplied by the first words, ligeantia sua debitum minime ponderan., &c., for a man may not confider his duty, and yet may not act or offend against it: And contra ligeum supremum dominum fuum, are not now necessary, nor were they anciently used. These do not positively express, but imply only, that the defendant acted against his allegiance; and indictments shall not be made good by intendments.

adly, Without the duty of allegiance there can be no treason, therefore an alien enemy cannot commit trea- Carth. 327. fon (a); an alien amy being here may: That for want Indicament not

for want of the geantim faze debitum in the indictment. 3 Lev. 396. 4 Mod. 162. Comb. 257. Skin. 338, 360, 425, 442. Carth. 317. Cafes B. R. 51. Holt 678. 3 Lev. 396. 4 Mod. 162.

\*[ 631 ] Psft. 633. 3 Infl. 11. Hob. 271. Co. Lit. 129. Cal Calvin's

(a) This feems to be not perfectly correct; for though aliens invading this kingdom are not guilty of treason, the subjects (who reside within this realm) of a prince or flate at enmity with ser 185.

Great Britain are punishable as traitors for any act within the realm which would be treason in a natural-born subject. Vide 1 Hawk. ch. 17. f. 5. Fef-

therefore

intendment.
See 2 His/k.
P. C. 224 to
256. what certainty necessary
in indicaments.
Dyer 1552 Inft. 1293 Inft. 11.
Vide 2 Hawk.
P. C. 252.

to be supplied by therefore of these words, the crime wants a due description.

It is true, some precedents of indictments want the words contra ligeantia sue debitum. But to these the Chief Justice said, they were cases of treason made by particular acts of parliament, and not where the fact was treason in its nature; and that in such case it was sufficient if the indictment pursued the words of the statute, and concluded contra formam statuti, without concluding contra ligeantia sue debitum. The attainder was reversed (a).

(a) This judgment of reverfal was affirmed in Parliament. 1 Ld. Request 2. Show. P. C. 186, 7.

Vide 1 Hawk. P.C. cap. 17. Sec. 32, 33, 34.

## 3. Charnock's Case.

[7 Will. 3. At the Old-Bailey.]

Words of perfunction or confultation, an overt act of treason in compafsing the king's death. Vide Cro. Car. 123 & 332, 333. S. C. Ante 288. 3 Salk. St. Holt 133, 201, 682. Foiter 200. I Hale 111, 323. 1 Bl. Rep. 37.

THE question was at the trial, Whether words could be an overt act of treason in compassing the death of the king? For Hale, Placit. Coron. 13. says, Words are not an overt act of treason, unless set down in writing. Et per Holt, C. J. Loose words spoken without relation to any act or project, are not treason: But words of persuasion to kill the king are overt acts of high treason; so is a consulting how to kill the king; so if two men agree together to kill the king; for the bare imagination and compassing makes the treason, and any external act that is a sufficient maniscistation of that compassing and imagining, is an overt act: It was never yet doubted, but to meet and consult how to kill the king, was an overt act of high treason. Vide Gro. Car. 117.

[632] S. C. Parl. Caf. 127, &c.

## 4. Dominus Rex versus Walcot.

[Trin. 7 Will. 3. B. R.]

Judgmant in treason reversed for want of the words ipso vivente, or in conspectu ejus, as to burning the bowels. Vide Parl. Cas. 127, &cc. &c 136, &cc. Ante 630.

3 Lev. 396.

4 Med. 162, 395. Carth. 348. S. C.

RIT of error to reverse a judgment against the defendant in an indictment of high treason: The judgment was, quod interiora extra ventrem trabentur; but these words, in conspetu ejus & ipso vivente comburentur, were omitted: It was agreed, that if this be a necessary part of the judgment and omitted, the judgment is erroneous; for the judgment, in capital cases especially, is stated, and not arbitrary; and it was held that this was a necessary part; for though death is the ultimum supplicium, yet death inslicted one way is more severe than another, and more formidable; and if this judgment be right, all other

other judgments are wrong, for all others have these Staund. 182. words, viz. In confectu, &c. Vide 1 H. 7. 24. Br. Go- 3 lnst. 211. Comb. 369. ron. 121. Stow's Annals 513. Plowd. 387. Raft. 545. Case B. R. 95. Stound. 128. Co. Ent. 422, 423. Harrison, one of the Holt 680. regicides, role up and struck his executioner after his 6 S. T. Ap. 42. bowels were cut out, which shews the thing is not impos- Skin. 442. fible, though that be not very material. At another day 2 Hawk. c. 48. it was infifted, that the record below was right on an affi- 6th ed. thereof. davit, that swore, that the words ipso vivente were in the record below, and therefore it was prayed, that the clerk of the peace might attend by rule, which was granted; and upon his attendance it appeared upon examination, that the minutes of the judgment taken and entered upon the record of the indictment had these words in; but Mr. Turner, clerk of the peace, said, that Sir Robert Sawyer, then attorney-general, after the trial faid, that use was to be made of the record in Ireland, and therefore examined it before it was transcribed, and then this record, which is now certified, was entered at large; so that the question was, Which was the record? Et per Cur. That which was entered at large is the record. Then the counsel Record of judgmoved it might be amended by the minutes: And Holt, ment in treaton refused to be amended by the amend it here; for if a record in C. B. be erroneous, we minutes of the cannot amend it here; but upon diminution alleged here, Bailey. Vide we grant a certiorari; but there can be no diminution al- 2 Hawk. P. C. leged at the Old Bailey.

adly, He questioned much if it were at all amendable, Bur. 2527. and cited Sampson's case, Jones 421., where the Court were divided; and it is there faid by Kelynge, that there were no precedents of any such amendments. And after the case had been argued several times at the bar, upon the matter in law, the Court, Trin. 8 W. 3., unanimoully, upon solemn arguments, reversed the attainder, for want

of the words ipfo vivente, or in conspectu ejus.

## Cranburn's Cafe.

[Pasch. 8 Will. 3. B. R.]

RANBURN, a natural-born subject of England, Subject indicted for treason contra ligeantie sue debitum. It was objected, that it ought to be naturalis ligean- fuz debitum, tie sue debitum, or contra supremum naturalem dominum suum, well; otherwise to distinguish it from that which is local allegiance; for ec. in the case there are two forts of allegiance; a natural allegiance, as of an allen. that of subjects; and a local allegiance, as that of strangers Ante 631. residing here; and this is the allegiance in the indictment Hob. 271. Co. mentioned. Sed per Cur. If an alien be indicted for trea- Lit. 129. S. C.

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#### Ereason.

Holt 686.

fon contra naturalem dominum fuum, or naturalis ligeantia 4 S. T. 686. fue debitum, the defendant may give in evidence that he is an alien; for the indictment is restrained to that species of allegiance which is not due; but a subject may be indicted so, or contra ligeantie sue debitum; for allegiance is the genus, which being fet forth, all species are comprised un-

In indicaments for compassing the king's death, the treason being first laid, the overt act need not be laid proditorie Ses z Hawk. P. C. 38, 39, &c.

The indicament was, that at such a time and place proditorie trastaverunt proposuerunt & consultaverunt de viis & modis quomodo dominum regem interficerent & consenserunt & agreaverunt quod quadragint. bomines equestres should be provided, &c., for that end.

It was objected, that here are two distinct acts of high treason, and the latter is not laid to be done proditorie. Sed non allocatur; for, by Mr. Cowper, the et makes the whole but as one sentence; at least it conveys the force of the words in the former fentence to this, and makes it partake of them. Et per Holt, C. J. Here is but one treafon alleged, vis. compassing the death of the king, and that is faid to be proditorie; therefore it need not be repeated again in fetting forth the overt act; for the overt act is not the treason, but evidence of the treason. The treason itself lies in compassing, which is an act of the mind. Accordingly in the case of the regicides it was agreed, that the indictment should not be for killing the king, but for compassing and imagining his death, and that the killing should be alleged as the overt act; for by the statute the treason consists in the intention. But if a distinct treason, as that of levying war, had been alleged, where the treason consists in the act and not in the intention, the act must have been said to be done proditorie; for the act of levying is a treason, and not an overt act of treason or bare matter of evidence.

Otherwise where the treason confifts in the act.

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## Cook's Case.

[8 Will. 3. At the Old-Bailey.]

Copy of indictment not granted after pleading.

N the indictment against Cook, after the Court was sat and the jury called, but not fworn, Sir Bartholomew Shower of counsel for the prisoner made objections to the indicament, but it was held right enough; upon that he urged, that then he had not had a copy, and the prisoner could not be tried. Et per Cur. By the words of the act he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service

to require it, but was able to plead without the help of it (a).

(a) By stat. 7 Ann. c. 21. the party to be produced, and the jurors impanindicted shall have a copy of the in- nelled, delivered to him ten days bediciment, and a list of all the witnesses fore the trial.

## 7. Vaughan's Cafe.

THE defendant was indicted for treason, in adhering Indictment for to the king's enemies, cum pluribus fubditis Gallicis treason in levy inimicis domini regis, and that they did navigate a certain ing war, or adhering to the vessel called Clancarty, with a design to destroy the king's king's enemies And it was held by Holt, C. J. and the other jus- senerally, withtices at the trial, that an indictment for levying war, or ticular inflances, adhering to the king's enemies generally, without shewing not good. particular acts or instances, is not good; for the words 1 Hawk. P. C. of the statute are, and thereof be provably attainted by some Holt 689. overt deed, which comes after the particulars of compassing 5 S. T. 17. the king's death, levying war, and adhering to the king's 6 S. T. Ap. 57. enemies; and it would be violence to restrain them to the first article only without regard to the last, to which they are equally connected; if they are to be restrained to a fingle article, it ought rather to be referred to the article of adhering only.

And if it be not a good indictment without special acts. &c., the question is, Whether those that are alleged ought not to be proved, and no others? Et per Holt, C. J. Foster 245. A distinct overt act cannot be given in evidence, unless it relate to that which is alleged, or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence; as if confulting to kill the king be alleged, any actings or doings in pursuance of that consultation may be proved; for it proves their agreement and consent, and is a farther manifestation of the act alleged

in the indictment.

It was also objected, that in evidence the seamen must appear to be Frenchmen born; for if they were Dutch, they are not subditi Gallici.

adly, That though he was faid to adhere to the king's enemies, yet it was not faid to be against the king.

3dly, That this was not a sufficient act of adhering, without fighting, or some act of hostility. Et per Cur.

1st, If the States be in alliance, and the French at war Joining with rewith us, and certain Dutchmen turn rebels to the States, bels subjects of and fight under command of the French king, they are in-imici to us, and Gallici fubditi: For the French subjection the command of makes them French subjects in respect of all other nations an enemy prince, but their own; and if such cruise at sea, and an English- is treason in adhering, &c. Vol. II.

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man affift them, he is a traitor, but not a pirate, for none are pirates that act under the command of a fovereign

prince.

Though the fighting be di-1 Hawk. P. C. 37, 38.

adly, Adhering to the king's enemies must of necessity be against the king; and therefore if an Englishman affist rectly against an the French, being at war with us, and fight against the king of Spain, who is an ally of the king of England, this is treason, as adhering to the king's enemies against the king; for the king's enemies are hereby strengthened and encouraged, and so is within the express words of 25 E. 3. of adhering to the king's enemies; and it is fusficient to allege the treason in the words of the statute.

Cruifing is a fof-

3dly, Cruifing is a fufficient overt act of adhering, com-Asient over act. forting, and aiding; as if Englishmen would list themselves and march, this is sufficient without coming to battle, and there may be levying war without actual fighting. Vide Vaugban's trial.

See Raym. 367. That an indistment for high treason may

be tried by nift prins.

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## Trespals.

## Incledon versus Burgess.

[Mich. 1 W. & M. B. R. Intr. Mich. 4 Jac. 2. Rot. 282.]

Contra pacem is TRESPASS for breaking, entering, and depasturing, fubiliance. Vide post. 641. Cro. 36 Car. 2., continuando the depasturing till 4 Jac. 2., post. 641. Cro. coniro pacem domini regis nunc, which was K. James the Se-Jac. 527. 1 Hawk. 244. cond. This was held naught, for then there is no contra 2 Hawk. 243. pacem to the trespals tempore Caroli Secundi, but it is omit-6 Mod. 128. 4 Mod. 145. 1 Salk: 67. ted, and contra pacem is substance. Vide Cro. Car. 325. Cro. Juc. 426, 443, 537. Yelv. 66. Vide 1 Sid. 253. 2 Cro. 377. 2 Vent. 49. Show. 27. Comber. 165. S. C. Carth. 65. S. C. Floit 342. 4 & 5 Ann. c. 16. must be taken advantage of on special demurrer.

Hore versus Chapman.

### [· · · 1 Will. & M. B. R.]

Decla vi n in trespals, Quare vi & atm's, &ca Bil See a Lev.

IN trespass the plaintiff declared, quare vi & armis claufum fregit, and, after verdict for the plaintiff, judgment was arrelled, for quare is not positive but interrogatory, and much worse than quod cum. Vide I Cro. 420. 206. 2 Jon. 197, 2 Cro. 47. 2 Bulft. 214. Godb. 251. 2 Keb. 400. 1 Sid. 2 Show. Caf. 17. 326. 3 Cro. 57. 1 Keb. 377. 413. 1 Wilfon 326. 3 Cro. 57. 1 Keb. 377. 99. 2 Wilson 203. Contra.

## Wildgoose versus Kellaway.

[Trin. 3 W. & M. B. R. Rot. 268.]

TRESPASS for breaking his house and taking away Decharation in his dishes; the defendant justified under a by-law, but trespass without that being ill, the plaintiff demurred; but the defendant on a general detook exception to the declaration, because it wanted the murier. Vide words vi & armis; and the Court held it naught on a ge- 1 Hawk. 145, neral demurrer (a), being an omission of the substance; 2 Hawk. 241, for it alters the judgment from a capiatur to a misericordia. 242. Item, It belongs to the jurisdiction of the county court, if it be a trespass without vi & armis.

(a) By flat. 4 and 5 Ann. c. 16. it is aided on a general demurrer.

## 4. Smith versus Kemp.

[Trin. 4 W. & M. B. R.]

[ 637 ] S. C. 4 Mod. 186. Skin. 342. Holt 322.

TRESPASS vi & armis, for taking fishes ex libera Trespass lies for piscaria sua. Upon not guilty pleaded, and verdict fining in libera for the plaintiff, it was moved in arrest of judgment by taking his fifts. Carthew, that he that had libera piscaria, could not main- Comber 11,433. tain trespass; and compared it to the case of a commoner 454. 4 Mod. who could not bring trespass for a trespass done in the s. c. H. who common: I hat libera piscaria was not like libera warrena, hath free warren, for he did allow that he who had libera warrena might pals a sainft any have trespass against any one but the owner of the soil, for but the owner of hunting in his free warren. 2 Ro. 111, 550., because the soil, for libera warrena was a liberty to hunt in one's own or ano- 6 Mod. 183. ther's ground, exclusive of all others; and that this was 2 K-b. 178. granted by the king, who is master of all games: But 3 Mod. 97. libera piscaria was only a freedom of fishing with others, and the same with communis piscaria, and for this he cited 1 Inft. 122., and that such a grantee had only a liberty to take fish, and no property in them until taken; and so prayed that judgment might be arrested.

Holt, C. J. cited and relied upon the Reg. 95. in point, Vide Dav. Rep. where there is the same writ, and likewise in F. N. B. 15. 159. 1 salk. G. H. 43 E. 3. 11, 6., and said there were three forts of 137. fisheries. 1. Separalis piscaria, and there, he who had the fishery was owner of the soil, and therefore it is a good Vol. II. plea

F. having libera pifearia hath property in the fifn, and Co. Lit. 122, denied. Vide ante 556. 11 Co. 17, &c. Cm. Car. 553, 554

plea in an action brought by him, that it is liberum tenementum of another. . 2dly, Libera pifcaria, which is where the right of fishing is granted to the grantee, and such a grantee hath a property in the fish, and may bring a posfessory action for them, without making any title. 3dly, Communis piscaria, and this was to be resembled to the case of other common; and disallowed the authority of 1 Inst. 122. (a) Eyre, Justice, said, that he took 1 Inst. 122. to be law, and that many judgments and precedents were founded upon that case, and that libera ex vi termine did imply common, which the Chief Justice and Dolben denied in defence of the Register. Et nota dict. fuit per Carthew in this case, that there were several write there against law, particularly R. 105., trespass per baron and feme for affaulting the wife, and taking the goods of the husband.

(a) The passage in 1 Inft. 122. relative to this subject is as follows: " A man may prescribe to have seperalem piscariam in such a water, and the owner of the soil shall not fish there; but if he claim to have communiam pifcariae, or liberam piscariam, the owner of the soil shall fish there." In 2 Bl. Com. 39. it is stated, agreeably to the opinion of Holt, that ownership of the soil is essential to a several fishery; but in Seymonr v. Lord Courtenay, 5 Bur. 2814. the Court declined giving any opinion upon the point. In Kumersley v. Orpe, Doug. 56. it is men-tioned as a point which seems still not quite settled. Mr. Hargrave, in a note to the above passage, in 1 Inft. observes, "We do not understand why a feveral fiftery flould not exist without the foil, as well as a several pasture." And, having examined the authorities in support of the contrary pofition, he fays, "The arguments, as it should seem, are short of the purpose, for at the utmost they only prove, that a several fishery is presumed to comprehend the foil, till the contrary appears, which is perfectly confistent with Lord Code's position, that they may be in different persons; and indeed appears the true doctrine upon the fubject." In Seymour v. Lord Courtenay it was ruled, that a grant of filhery, with the exception of oyslers, and a refervation of a right to take fifth for the grantor's own title, constituted a feweral fishery, no other person having a co-extensive right with the grantee. It was held, that it could not be a free fishery, because no person had a coextensive right.

## 5. Gibbon versus Pepper.

[Pasch. 7 Will. 3. B. R. 1 Ld. Raym. 38. S. C.]

Justification must confess the trespass. S. C. 4 Mod. 404. 2 Lev. 179. 4 Mod. 404. S. C. Styl. 72. 1 Vent. 295. 2 Jo. 205. 638

In trespass and assault, &c., the defendant pleaded that he was riding a horse in the king's highway, and that his horse being frightened ran away with him, and that the plaintiff and others were called to, to go out of the way, and did not; and the horse ran upon the plaintiff against his will, &c. The plaintiff demucred, and had judgment; not but if the desendant had pleaded not guilty.

guilty, this matter might have acquitted him upon evi- 3 Lev. 37dence; but the reason of their judgment was, because the Hob. 134. desendant justified a trespass, and does not confess it; for Abr. 548. if A. beats my horse, by which he runs on another, A. is Style 72. the trespasser, and the rider is not. And as to Hob. 134.

Mo. 864. placito 1192. 1 Brownl. Procedents 188. they Vide 3 Will. differ, for in them a battery is confessed,

## Ashmead versus Ranger.

[ Trin. 11 Will. 3. B. R. 1 Ld. Raym. 551. S. C. Comyns 71. S. C. 1

TRESPASS was brought by leffee of a copyholder Trespass by leffee for life, for breaking his close, and cutting down his of a copyholder trees; the defendant justified as fervant to the Earl of ting down by the Kent, lord of the manor. The plaintiff replied, that the lord of the macopyholder was tenant for life, his house in decay, and tainable in B. R. that the trees growing on the land were not sufficient to and affirmed in Upon demurrer, Holt, C. J. held, that Cam. Scacc. but repair, &c. 3 Cro. 5. was not law, and that the copyholder was tenant Lords. S.C. of the trees as much as of the land; that the fruit and the Cafes B. R. 378. acorns belonged to the tenant; and he held, that if H. has Holt 162. Fort. all the thorns in such a place for estovers, he may maintain 152. S. C. Vide trespass against any one that cuts them, even his grantor, and in such case need not aver that he burnt them. But where H. hath only estovers to be taken in such a wood or place, and the grantor cuts the whole, the grantee may maintain case against the grantor, but not trespass vi armis; and the whole Court held the action was well maintained by the possessory right which the plaintiff had: The judgment was affirmed in Cam. Scace. but reverfed in the House of Lords; for the tenant could not cut the trees; and if the lord could not, they must rot on the land; for then nobody could.

## Monkton versus Pashley.

S. C. 6 Mod. 38. Holt 697.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 974. S. C.]

TRESPASS for entering his close and hunting such Trespass for ena day continuando transgr. prad. quoad the hunting, di- tering his close versis diebus & vicibus, from the day of the trespass alleged laid with a contill fuch a day. Salkeld urged that this appeared not to be tinuando, and continued; that some acts were permanent without inter- held well. Vide mission or repetition, which properly lie in continuance, 2 Mod. 253. others not.

S3

2 Salk. 359.

5 Mod. 178. I Sid. 319. 6 Mod. 39. 1 Lev. 210. 1 Vent. 363, 224, 249. 2 RoL Abr. 549. 2 Mod. 253. Yelv. 126. Raym. 396. Cro. Eliz. 182.

2dly, That some acts terminate in themselves and cannot be repeated, as killing a dog, when once done it cannot be done again; therefore this cannot be laid with a continuando. Vide 1 Lev. 210. 2 Ro. Abr. 549. And as to repeatable acts, wherever the first trespals is without an ouster, there every several entry is a distinct trespass and a new trespals, and not a continuance of the first; for a release of the first would not discharge the second. Vide Cro. Jac. 107. Yelv. 126. [which Holt. C. J. denied; for the continuance must be answered as well as the first act.] But where the first entry is with an ouster, there every other act or entry during the ouster is but a continuance of the first trespass, and a release of the first discharges all. Vide 1 Brownl. 223. Cro. Eliz. 210. 1 Lev. 210, compared with 1 Sid. 319, and so is F. N. B. 91. b. to be intended. So is 20 H. 7. 3. 2 Ric. 3. 15. 21 H. 8. 43. Holt, C. J. held, that of acts that terminate in themselves, and once done, cannot be done again, there can be no continuando, as hunting and killing a hare or five hares, but that ought to be alleged, that diversis diebus & vicibus inter fuch a day and fuch a day, he killed five hares, or cut and carried twenty trees: And where a trespass is laid in continuance, that cannot be continued, exception ought to be taken at the trial, for he ought to recover but for one trespass. The Court held, that hunting might be continued as well as spoiling and consuming his grass, or cutting his grafs; and as to the case of an entry and ouster the Court held, that the plaintiff being ousted and having made a re-entry, might bring trespass, and declare that he entered such a day, continuando, &c., or that he entered fuch a day, & diversis diebus & vicibus between such a day and fuch a day. And the plaintiff had judgment.

Acts that being once done cannot be repeated, cannot be laid with a centinuando. Comb. **193, 377, 427,** 433. Fa:efl. 152. 5 Mod. 178.

Cowp. 828.
2 Ld. Raym. 239.

Comb. 426, 427.

## Brook versus Bishopp.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 823. S. C.]

Trespass in cutting down fuch a number of tices cannot be c. ntinued; but a general contiapplied to what may be continued Farell. 152. z Ld. Raym. 239. Skin. 42. 2 Sho. 196.

TRESPASS quare vi & armis the defendant, on the 2d of April, broke and entered his close, and trod down his grass, nec non arbores suas, viz. 10 populos & subbescum suum, viz. 10 carectatas subbesci succidit cepit & asnuando shall be portavit transgressiones pred. usq; 27 Aprilis diversis diebus & vicibus continuando; and after verdict and entire damages, it was resolved, 1st, That the continuance, as to after verdict. Images, it was retolved, lit, that the continuance, as to Vide ante, pl. 7. the poplars and underwoods, was impossible, and could not

> adly, That no part of the damages shall be intended to be given for that, but shall be applied to such trespasses as

may be continued, according to 1 Vent. 363., continuando T. Jon. 194. transg. prad. generally, shall only refer to so much as lies Cowp. 828. in continuance; but if it be continuando fuch and fuch particulars, and they lie not in continuance, it is naught after

## 9. Joce versus Mills.

[ 640 ] s.c. 6 Mod. 14.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 890. S. C.]

TRESPASS quare clausum suum apud D. fregit & Trespas quare duos equos apud D prad. in clauso prad. invent. existen. duos equos apud D. in clauso & centum congios tritici de bonis propriis ipsius adtunc & ibidem præd. invent similit. invent. & existen. cepit & asportavit, &c. The de- existen. & tritifendant pleaded not guilty to all but the two horses, and as propriis ipsius A. to them a distress for rent; upon which it was demurred, &c. cepit, does the iffue being found for the plaintiff, and contingent da- not shew the promages entirely given on the demurrer: And now the plea horses, being held an ill plea, Mr. Branthwayte moved in arrest of Vide ac. 1 Ld. judgment, that the horses were not laid to be the goods of Raym. 239. the plaintiff; for that it did not follow that they were the 9%. 1 T.R. plaintiff's horses, because found on the plaintiff's close. 400. Vide 2 Cro. 46. Yelv. 36. equum cepit a perfona fua. 2 Lev. 156, 430. 3 Bulft, 303. quod fuit concess. per Cur.

adly, It was urged and admitted, that the plea did not Plea of taking confess a property; for the defendant might distrain the by diffress for

goods of a stranger for the rent.

rent does not confess property.

3dly, It was held, that the copulative et did not let it into the subsequent part of the other sentence, so as to make the horses come under the de bonis propriis, like the case in Raymond 395. Trespass for taking a mare ipsius quer. nec non bona & catalla fequent., nor 2 Saund. 379. which cases were allowed; and the reason is, because they are different fentences, and the first is closed up by the place being added: Yet Gould, J. agreed the case in 2 Ro. 250. placito 7.; for there, by virtue of the copulative, the ipsius querentis goes to all.

4thly, It was held the plaintiff could have no judgment, Vide 3 T.R. because the conditional damages were entire, secus if seve- 455-

ral.

## 10. Russel versus Comb.

S. C. 1 Salk. 119. Vide post.

[Mich. 2 Ann. D, R. 2 Ld. Raym. 1031. S. C.]

HERE matter may be laid as aggravation of tres- 2 Cro. 123. pass, for which alone trespass lies not, vide this case, Mod. Cas. 127, title Baron and Fene, pl. 12. pag. 119.

S. C. 6 Mod. So.

#### Day versus Muskett. II.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 985. S. C.]

Trespass laid in a former king's time, contra pacem of the prefent, ill on demurrer, but \* [641] ante 636. 1 Hawk. 244. 2 Hawk. 243. 7 Sid. 253. Carth. 65. Comb. 166. 4&5 Ann. c 16.

T RESPASS quare vi & armis primo die Febr. ann. Dom. 1701, clausum suum fregit, and concludes contra pacem domine Anne nunc regine, &c. The defendant pleads, that he and another did the trespass jointly, and cured by verdict. that the plaintiff relaxavit to the other. To that it was replied non est factum; to which it was demurred, and judgment pro def., for King William died the 8th of March Cro. Jac. 527. July 1701, fo it was contra pacem regis, and not contra pacem revelv. 66. Vide 1701, fo it was contra pacem regis, gina; the omission of contra pacem had been only matter of form, but here it is repugnant, for the Court must take notice of the demise of the king; that is the description of the trespass, and a trespass done contra pacem regis could not be given in evidence: Indeed a verdict would have aided it. 16 & 17 Car. 2.

## Green versus Goddard.

[.... Ann. B. R.]

October, 3 reg. The defendant, as to the vi & armis.

Where in enter- TRESPASS, affault, and battery laid on the first of ing H.'s close, depart ; otheris actual force. 3 Salk. 308. 6 Mod. 217, 260. 2 Vent.

force in law, H. pleaded non cul. And as to the residue says, that long becann t lay hands fore, viz. on the 13th of September, a stranger's bull had on the trespasser broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the faid wise where there close, & manu forti impedivit ipsum ac taurum prad. rescufsisse voluit, & quod ad praveniend. &c. ipse idem defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, &c., absque boc quod cul. fuit ad aliquod tempus ame 75. 1 Saund. 35. eundem 13 diem. The plaintiff demurred. Mr. Eyre for the plaintiff argued, that they should have requested him to go out of the close. 19 H. 6. 31. 11 H. 6. 23. 2 Re. Tresp. 547, 548, 549., and that flagellum molliter imponere is repugnant. 1 Sid. 4. Lastly, The traverse is short, and no answer to the time after. 1 Leon. 307. 3 Cro. 87. 1 Ro. Rep. 406. Et per Cur. There is a force in law, as 268. Com Dig. in every trespass quare clausum fregit: As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every impositio manuum is an assault and battery, which cannot be justified upon the account of breaking the close in law, without a request. The other is an actual force, as

in burglary, as breaking open a door or gate; and in that

2 Brownl. Ent. 260. 3 Lev. 113. Rep. B. R Pleader, 3 M. 16.

case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close vi & armis, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence: So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request.

adly, Powell, J. held, that the attempt to take and ref- Taking eattle cue the bull was an affault on his person, and a taking from H. is a taking from his from his person; for if H. is driving cattle on the high-person way, and one comes and takes them from him, it is robbery, which cannot be without a taking from his person;
quod non fuit negatum. Vide 29 H. 6. 66. 2 Ro. 549. plaB. R. Temp.

cito 11. 1 Ro. Rep. 19.

\* 3dly, They held the quod eft idem residuum good with- Where traverse out a traverse, and therefore no traverse was necessary; goes to the matter, all before is inducement and inducement and it be thort, for here it goes only to the time; where quod waived; otherest idem avers it to be the same. Et per Holt, C. J. Where wise where to a traverse goes to the matter of a plea, &c., all that went # 1640 before becomes inducement, and is waived by the traverse; but where a traverse goes to the time only, what was set out in the plea before does not become bare matter of inducement, nor is it waived by the traverse. Sed adjournat, Mr. Eyre pro quer, Mr. Brydges pro def.

## 13. Cockcroft versus Smith.

Pasch. 4 Ann. B. R. 1 Ld. Raym. 177. S. C. stated at the end of the case of Cook and Beal.]

N trespass for an assault, battery, and maihem, desendant Son assault depleaded son affault demesne, which was admitted to be a mesne, a good good plea in maihem. But the question was, What asfault was fufficient to maintain fuch a plea in maihem? affault was vio-Holt, C. J. said, that Wadham Wyndham, J. would not lent. S. C. allow it if it was an unequal return; but the practice had 263. Rep. A.Q. been otherwise, and was fit to be settled: That for every 43, 52. Holt assault he did not think it reasonable a man should be 699. assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defence: That if A. Strike B., 1 Sid. 240. and B. strikes again, and they close immediately, and in 1 Rolling. the scuttle R maihema A that is 600 M. in 1 Will. 5. the scuffle B. maihems A., that is son assault; but if upon a little blow given by A. to B., B. gives him a blow that maihems him, that is not fon affault demesne. Powell, J. agreed; for the reason why son assault is a good plea in maihem.

maihem, is, because it might be such an assault as endangered the defendant's life (a).

(a) In the principal case Holt directed the jury to find for the defend-In Ld. Raymond, the first assault is stated to be tilting the form on which the defendant sat; in Rep. A. Q.

(11 Mod.) that the plaintiff ran his finger towards the defendant's eye .--The maihem was biting off the plaintiff's finger.

## Newman versus Smith & al.

[Trin. 5 Ann. B. R.]

tiff's house and affaulting him. Affaulting and menacing his fervants may be laid by way of aggravation. But must not make feveral counts of it. 6 Mod. 127. Vide ante 593, [643]

Trespass for entering the plainTRESPASS de eo quod the defendants tiel jour & ann tering the plainabud W. upon the plaintiff insult, secer. & ipsum verbeapud W. upon the plaintiff insult. fecer. & ipsum verberaver., &c. Ita quod de vita, &c., & domum ipsius quer. apud W. pred. adtunc & ibidem freger. & intraver. & quer. in quiet. usu & occupatione donnus prad. disturbaver. & impediver. necnon in prad. quar. & filium suum & M. N. & R. N. filias præd. quer. & E. N. servam suam minas de verberatione eorum adtunc & ibidem imposuer. & ipsos injuriis & gravaminibus, viz. insult. & affraiis adtunc & ibidem effecer. Et alia enormia, &c. Upon not guilty it was found for the plain-594. I Salk. 119. tiff; and Mr. King moved in arrest of judgment upon S.C. Holt 699, 2 Cro. 501., that the master could not maintain trespass 700. 2 Cro. 123. for beating his fervant or children without special damage, Med. Cases 127, high such to be specially showed. Mr. Evre answered. which ought to be specially shewed. Mr. Eyre answered, and so it was resolved, that the action was for the breaking and entry, and the farther description is only to shew the Court how enormous that trespass was; and the plaintiff could not recover damages for losing the service of his Ante 640. pl. 10. children or fervant, nor could that be given in evidence; Videac. Str. 61. because the plaintiff might have a proper action for that purpose: But the circumstances mentioned might be proved in evidence to aggravate damages for the defendant's trespass by breaking and entering. And whereas is was faid, ibidem refers to the vill, and it should be in doma pradict., it is plain the adtuncties it to the same time, and then it could not be at a different place at the fame point of time.

Bull. N. P. 89.

## Layton versus Grindall.

[Pasch. 8 Ann. B. R.]

Trespass for entering his house and taking separates claves pro apertione of liorum domus prad. and taking lepa-ral. claves pro Upon not guilty pleaded, the plaintiff had a verdict, and

it was objected, that the taking of each key was a distinct apertione offictrespass, and might require several answers, and the kind and number ought to be ascertained. Vide Playter's case, sewing number. 5 Co. 34. 1 Vent. 53. 2 Vent. 262. But to this it was answers, wide 2 Str. 167. 2 Ld. Raym. 1410. 3 Wiff. tained by reference to the house. Vide Al. 2. Sty. 43. 292. 1 Vent. 114. 2 Cro. 485.

#### 16. Anonymous.

[Pasch. 8 Ann. B. R.]

TRESPASS for taking his cattle. The defendant Where the trefpleaded that he was possessed of a close for a term of pass is transitory years, and the cattle trespassed therein, &c. The plaintiff cannot pretend a demurred, and judgment was given for the defendant, right to the though he shewed no title, but justified upon a bare posfession. And this difference was taken by Holt, C. J.
Where the action is transitory, as trespass for taking goods, possession only.
the plaintiff is foreclosed to pretend a right to the place;
Med. 4.59. nor can it be contested upon the evidence who had the Carth. 10. right; therefore possession is justification enough: But in 2 Mod 70. trespass quare clausum fregit it is otherwise, because there 3 Mod. 132. the plaintiff claims the close, and the right may be contested.

Southby versus Eaton, Mich. 16 Gco. 2. B. R. In error same point adjudged.—Note to 5th edition.

## Trial.

[ 644 ]

Vide 7 Co. 2, 3, 4, 7, &c. 9 Co. 30, 31, 32, &c.

## Anonymous.

1 Mod. 55.

[Pasch. 5 W. & M. B. R.]

A Cause cannot be tried at bar where action is laid in Vide ante 625. London, by reason of their charter.

post. 648, 649. Str. 854.

But nota. The great cause of Lockyer versus the East India Company was tried at bar, Mich. 2 Geo. 3. by a special jury of merchants of London, the privilege being waived, 2 Wilf. 136.

#### 2. Smith versus Brampston.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. S. C. named Smith werfus Frampton.]

New trial was denied in case for megligently keeping his fire; verdict pro def.

Though the verdict was against evidence, a new trial was denied, because it is a hard action; yet note; Action against the hundred for a robbery, verdict pro def., and salled Smith vernue trial granted.

1 Sid. 58. (a)

(a) The principles upon which granting new trials depends, are stated very clearly in 3 Bl. Com. ch. 24. and in the case of Bright v. Eynon, 1 Bar. 390. In that case it was said by Denijon, J. " That it would be difficult, perhaps, to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken than explain it; but the granting a new trial must depend upon the legal discretion of the Court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice," In order to induce the Courts to grant a new trial, it is not sufficient that a cause is of value or importance, but it must also involve a doubt; although value frequently weighs in granting a rule to flew cause, Vernon v. Hankey, 2 T. R. Where complete and substantial justice has been done, a new trial will not be granted, though the judge who tried the cause may have been mikaken in point of law; as where an action was brought by a person for a violent assault on her niece, who lived with her, per quod serv. amisit, and the judge held that the aunt stood in lace parentis, whereon large damages were given; -the plaintiff undertaking to pay the damages to the niece, and the niece not to proceed in an action which she had brought for the affault, the rule for a new trial was discharged. Edmonson v. Machell, 2T.R. 4. So where a person brought an action on a premisfory note given by his wife's father in confideration of marriage; and it appeared that the plaintiff being under age, and, having no parent or guardian, was married by licence, and the wife, when the plaintiff came of age, was lying in extremis in her death-bed, and died in three weeks afterwards, the judge left it to the jury to prefume a subsequent marriage by banns, and the verdict being for the plaintiff, a rule for a new trial was discharged, Wilkinson v. Payne, 4 T. R. 468.

In Farewel v. Chuffer and others, 1 Bur. 54. Lord Mansfield said, that a new trial ought to be granted to attain real justice, but not to gratify litigious passions on every point of summum jus, and cited several of the cases which are reported under this title (1). In these cases the verdicts were against evidence and the strict rule of law, but the Court would not give a second chance to a hard action, or an unconscionable defence. Accordingly new trials were refused in Macrow v. Eall, 1 Bur. 11. which was an action for a trespass reported to be sufficiently proved, but trifling, frivolous, and vexatious; Burton v. Thompson, 2 Bur. 664. being an action for a libel in which the charge was proved, but the injury appeared very inconsiderable; Marsh v. Bower, 2 Bl. 851. an action for words, wherein small damages should have beengiven; and Reavely v. Manwaring, Walker, and others, 3 Bur. 1306. where the defendant W. fent a press-gang to take some apprentices of the plaintiff's

by their own consent, but appeared to act with good intentions. Vide also Norris v. Tyler, Comp. 37.

A new trial will not be granted for a mistake in the proceedings, 2 Str. 1131. Leeman v. Allen, 2 Wilf. 160. Mather v. Brinker, 2 Wilf. 243.; nor where the verdict could not be supported according to the pleadings or form of action, but the same effect might have been had upon other proceedings at law or in equity. Vide Goslin v. Wilcock, 2 Wilf. 302. Foxcroft v. Devonshire, 2 Bur. 936. Sampson v. Appleyard, 3 Wilf. 272. Aylett v. Lowe, 2 Bl. 1221. Goodtitle v. Bailey, Covvp.

597, 601.

It was formerly a prevalent rule, that there should be no new trial when there was evidence on both sides; but in Norris v. Freeman, 3 Wilf. 38. where a writing, purporting to be a release, appeared to be attested by two witnesses, one of whom was called, and the other not, and there was contradictory evidence as to the hand-writing of the party, a new trial was granted, as the other attesting witness should have been called; and the Court held, that there were many cases where new trials would be granted, notwithstanding there was evidence on both sides. The point does not seem to be much regarded in modern practice. Courts will not grant a new trial because the judge who tried the cause, or themselves, might have drawn a different conclusion from the jury with respect to any matters of fact, if the evidence was proper to leave to the jury concerning such fact, Asbley v. Ajbley, 2 Str. 1102. Anon. 1 Wilf. 22. Swain v. Hall, 3 Wilf. 45. Hankey v. Trotman, 1 Bl. 1. Camden v. Corvley, 1 Bl. 418. Whether there be any evidence is a question for the judge, whether fufficient evidence is for the jury, Carpenters Company in Sbrewsburg v. Hayward, Doug. 374. But a new trial will be granted if the jury, upon the facts proved, find a verdict contrary to law, as where they found a verdict for the infured against an underwriter, though a material fact was not difclosed, Hodg fon v. Richardson, 1 Bl. 463. Vol. II.

So where they found that the holder of a note had used due diligence to obtain payment from the maker, when the Court thought otherwise, it being a question of law; and also upon the same verdict being given a second time, Tindal v. Brown, 1 T. R. 167. Vide Pillans v. Van Mierop, 3 Bur. 1363. The Courts will also grant a new trial if a point has been improperly left to the confideration of the jury; as, whether a loan to fave a person from immediate failure, with no other prospect but the chance of being repaid, was fraudulent, Foxcroft v. Devenshire, 2 Bur. 930. 1 Bl. 195. Whether by the custom of merchants an indorsement of a bill to J. S. (not adding to bis order) restrained the general negotiability of the bill, it being a matter of law, and clearly and fully fixed, Edie v. the E. I. Com. 2 Bur. 1216. 1 Bl. Rep. 295. Whether the charter of a corporation did or did not refer to and adopt antecedent usage, (the construction of charters belonging to the Judge or Court,) Corporation of Liverpool v. Golightly, E. 33 G. 3. B. R. MS. So when it was left to a jury, ist, Whether a party's name to an instrument was forged; 2d, Whether, supposing it not to be forged, itwas obtained by fraud without her knowing the contents and effect, when there should have been an express direction that the circumstances of the case spoke fraud apparent, Bright v. Eynon, 1 Bur. 390.

A new trial will not be granted if there is a bill of exceptions depending on the same point, unless the party applying will waive the bill of exceptions. Fabrigas v. Mostyn, 2 Bl. 929. If there are two contrary verdicts, the party against whom the last is given is not by any law or practice entitled to a third, Parker v. Ansel, 2 Bl. 963. A new trial will not be granted in a writ of right, unless the verdict is flagrantly wrong, Tyfon v. Clerk, 2 Bl. 941. The certificate of the judge respecting the matter of fact as it appeared before him at the trial, is conclusive, Rex v. Poole, B. R. Hard. 23. Vide 5 Bur. 2667.

It was formerly the rule only to grant new trials upon the merits on payment of costs, except in particular cases; but it is now confidered as a matter generally in the diferetion of the Court. But when the judge is mistaken in point of law (1); or the jury find a verdict contrary to his direction as so the matter of law (2); or the plaintiff refules to fubrait to a nonfuit, contrary to the opinion of the judge, and a verdict is found for him (3); or a verdict is given properly for the plaintiff on one count, and improperly against him upon another (4); or the verdict has been obtained by concealing a witness for the adverse party (5); or by may improper artifice (6); a new trial is granted without cofts.

In the King's Bench, if a new trial is granted without any thing being

faid respecting the costs of the former, and the fame verdict is given upon the second trial as the first, the cofts of the second only are allowed. Majon v. Skurray, Doug. 438 Schulbred v. Nutt, n. ibid. Hankey v. Smith, 3 TR. 507; but in the Common Pleas, if two concerrent verdicts are given, the party succeeding is allowed the costs of both trials; if the second differs from the first, the coils only of the second, Parker v. Wells, H. Bl. 639. n. Trelawary v. Thomas, H. Bl. 641. Where the matter in dispute is small, a new trial will not be granted unless it can be done without compelling the party applying to pay colls, Jackjon v. Dachaire, 3 T. R. C53.

(1) Rice v. Shate, 2 Bl. 699. Bufcall v. Hogg, 3 Wilf. 146. Rathham v. Jefup, id. 338. Pale v. Bayla, Coup., 297. Harris v. Butterly, Coup., 485. Geodright v. Saul, 4 T. R. 359.
(2) Jachfen v. Duchaire, 3 T. R. 553.
(3) Packin v. Pawley, 1 Bl. 670.
(4) Edie v. E. I. Comp. 2 Bur. 1216. 1 Bl. 295.
(5) Monspelfon v. Randh, B. N. P. 328.
(6) Anderfon v. George, 1 Bur. 352.

## 3. Smith versus Frampton.

[Mich. 7 Wilt. 3. B. R.]

New trial. Vide No. 26 for negligently keeping his fire, per qued the plaintiff's house was burnt; the verdict was for the defendant: And after great debate and consideration a new trial was denied; because it is a hard action, and the jurors are judges of the sact: And yet Holt, C. J. declared, he was not satisfied with that verdict; quere, whether the the same case with the precedent? (a)

(a) Vide note to the preceding cafe.

## 4. Anonymous.

[Pasch. 8 Will. 3. B. R.]

New trial. Vide THE Court never, or very rarely, grants new trials in past. pl. 7, 8, actions for words. Per Holt, J. C. (b)

(b) Vide Barnes 229, 233. Com. Pleader, R. 17.

## Smith versus Page.

[Mich. 8 Will. 3. B. R.]

I N ejectment the plaintiff was a mortgagee, and claimed No new trial by furrender, whereas the land was not copyhold; and the defendant claimed only by a voluntary conveyance. Poft. pl. 17. The verdict was for the plaintiff, and the Court would not 1 Mod. 2. S. C. fet it aside, and grant a new trial against the honesty of Comb. 387. the cause (a).

(a) Vide note to Smith v. Brampflon, Supra pl. 2.

## Hatchell versus Griffiths.

[645]

[Mich. 8 Will. 3. B. R.]

SSUE was joined in Trinity term 1695, and notice Notice of trial. then given for trial next affizes, but no farther nor other proceeding till Trinity vacation 1696, and then the Ante 457. plaintiff gave a new notice of trial, viz. fourteen days notice for next affizes, when he accordingly tried the caufe and had a verdict; but because there was no proceeding within a year after the first notice, it was set aside: Sed nota. Notice within the term had been a proceeding within the year, and made notice for fourteen days good notice of trial (b).

(b) In Bogg v. Rose, 2 Str. 211. it was fettled on consideration that where a term's notice of trial is required, the notice must be given before the essoignday. A term's notice is not necessary when the defendant has delayed the proceedings by injunction, Bofworth v.

Philips, 2 Bl. 784. Hayley v. Ryley, Doug. 71.; nor where proceedings have been stayed by agreement for a certain time, Watkins v. Haydon, 2 Bl. 762.; nor where the proceedings have been delayed at the defendant's request, Bland v. Darley, 3 T. R. 530.

## 7. Anonymous.

S. C. 1 Salk. 273. 2 Salk.

[Mich. 8 Will. 3. C. B.]

A New trial was granted because the counsel were absent, New trial for the not thinking the cause would come on, and no defence was made; but a like motion was denied in B. R. Q. Vide 6 Mod. per Holt, C. J. Also in one Coppin's case, a cause came on 22,222,242. at seven in the morning, and an old witness could not rise Farell 156. to be there time enough; but it was denied, unless he 2 Saund 336. would make affidavit of what he knew, and would answer, Mod. Ca. \$2. fo that the Court might judge of it, and how it was ma- IBI. Rep. 298. Fitzg. 40. Str. 691. Note to pl. 16. terial.

#### Dent versus The Hundred of Hertford. 8.

[Mich. 8 Will. 3. B. R.]

A New trial was granted upon affidavit, that the foreman See Farell. 31, £ 37. declared the plaintiff should never have a verdict whatever witnesses he produced (a).

2 Str. 642.; but the Court will not receive an affidavit of the fact from the

(a) If the jury cast lots for the jurymen themselves, Vasie v. Delawal, verdict, it will be set afide, Hale v. Cove, 1 T. R. 11. Vide Comyns 525. Bemb. 51. Barnes 438. 2 Bl. 1299.

#### 9. King versus Burdett.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 148. S. C.]

Jury after going aroun the bar fent for an act of common copn cil given in evidence, and new trial denied.

A New trial was moved for upon affidavit, that the jury took an act of common council out with them, and that printed libels were spread against the defendant; and it was denied: For as to the first it differs from the Lady lue's case, where they took a map of one side, which was evidence on neither fide: But this was an act of neither fide, and evidence on both; but admitted to be irregular. Et per Holt, C. J. So if a jury eat at their own charge, it is fineable, but that verdict shall stand; otherwise if at the charge of one of the parties, and the verdict is found for him. Vide Mo. 599. (b)

Hole observed, that it was not fixed upon the informers, and if the delivery of papers by a stranger were sufficient to avoid the verdict, the case would never be decided. Vide the

(b) With respect to the second point, report in Ld. Raymond. If libels are published with intent to influence the jury and the public, it is a sufficient cause to postpone the trial, Rex v. Gray, 1 Bur. 510. Rex v. Joliffe, 4 T.R. 287.

### [ 646 ]

#### Salisbury versus Proctor. IO.

[Hill. 8 Will. 3. B. R.]

I N an action by an administrator the Court was moved Trial refused to be put off till to put off the trial, till a fuit pending in the Spiritual feat in the Spi-Court concerning the right of administration was detertermined. S. C. mined, which was to come on; which was denied per 5 Mod 324. Cur.; for we cannot take notice of fuits in the ecclefiasti-3 Salk. 130. Vide I Bl. 404. cal courts. 3 Bur. 511. 4 Bur. 2257.

#### Deerly versus The Duchess of Mazarine.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 147. S. C.]

I PON non assumpsit pleaded, the jury found for the New trial not plaintiff, though the duchers gave good evidence of granted for milher coverture; and the Court would not grant a new trial, law against the because there was no reason why the duchess, who lived honesty and here as a feme fole, should fet up coverture to avoid the cause. Ante, payment of her just debts (a). pl. 5. S. C. Ant. 116. Comb. 402.

(a) From the reports, ante 116. Court thought the coverture sufficiently 1 Ld. Raym. 147. it appears that the answered in point of law.

#### 12. Thermolin versus Cole.

[Hill. 8 Will. 3. B. R.]

F the defendant appears and makes defence, he shall No new trial for want of notice never have a new trial for want of due notice. after defence made. Ant. 423, 435. S. C. Ante 417.

#### Dominus Rex versus Bear.

[Pasch. 9 Will. 3. B.R. 1 Ld. Raym. 414. S. C.]

I PON an indictment for a libel, the defendant was Indictment for by verdict acquitted; Mr. Attorney-general moved libel, defendant for a new trial, but it was denied: And the Court faid, new trial denied. that anciently it was never done in criminal cases where N. B. Farest. 31 defendants have been acquitted; latterly, where it has & 37. S. C. heen a verdiff obtained by fraud or profiles as feeling Ante 324, 417. been a verdict obtained by fraud or practice, as stealing 3 Salk. 226. away witnesses, &c. it has been done, but never yet was Carth. 407. done merely upon the reason that the verdict was against Cases B. R. 218. Holt 422. evidence. Postea Mich. 10 W. 3. B. R. Per Holt, C. J. In indictments of perjury we never do it, because the verdict is against evidence; but if you prove a trick \*, as no no- Or ill practice Vide 1 Lev. 9, 124. Ne ferra, fi Post. 649. tice, &c., it is otherwise. le def. foit acquit, alit. s'il foit convict. (a)

See 2 Saund. 336. The defendant in error took out a record of nist prius, and proceeded to trial at the first ussizes after issue joined; yet held good, and a new trial denied.

indictment for not repairing a highway, a new trial for misdirection or

Vos. II.

(a) In Rex v. the Parish of Silverton, trials being never allowed where the 1 Wilf. 298. after an acquittal on an defendant is acquitted in a criminal case.

The trial of an indistment for makover-ruling evidence was refuled; new ing a partial rate having been postponed

#### Trial.

poned till after the trial of a feigned issue, to ascertain whether the rate was partial, and a verdict being given on the iffue for the defendant, which was alleged to be against evidence, the Court refused to grant a new trial, because it was within the same reason as if it had been upon a criminal prosecution, Rex v. Prued, 4 Bur. 2227.

In Mattison v. Allanson, 2 Str. 1238. Fonereau v. \_\_\_\_\_, 3 Wilj. 59. new trials on account of the verdicts being against evidence were refused on penal actions; but in Wilson v. Raftall, 4 T. R. 753. it was ruled that a new trial might be granted in a penal action where the judge had excluded admif-fible evidence. Jervois q. t. v. Hall, 1 Wilf. 17. was held not to be law fo far as it proceeded on a contrary prin-

In Norris v. Tyler, Cowp. 37. the Court refused a new trial after a verdict for the defendant in an action for a malicious profecution, as the fuit was

of a criminal nature.

[647]

#### 14. Turbervil versus Stamp.

[Mich. 9 Will. 3. B. R.]

No motion for new trial after motion in arrest of judgment. S. C. Ante 13. Comb. 459. B. R. 151.

Holt 9.

H. Shall not move for a new trial after motion in arrest of judgment; but after a motion for a new trial he may move in arrest of judgment. So it is of a writ of inquiry; after motion in arrest of judgment the defendant cannot move for a new writ (a). West versus Cole, Mich. Carth. 445. cannot move for a new wift (a). Well veryus Cole, Mich. Skin. 681. Cafes 10 W. 3. B. R. The same point was held in C. B. Pasch. 8 W. 3. Philips versus Crabb.

Fowler, Com. 525.; or where, on the v. Gough, Doug. 797. report of the trial of an indictment

(a) After motion in arrest of judg- enough appeared to raise an inclination ment a new trial may be granted for in the Court to think the defendant misbehaviour of the jury, Philips v. ought not to have been convicted, Rex

#### 15. Starr versus Wade.

[Pasch. 10 Will. 3. B. R.]

LESSOR brought trover against the lessee, for trees cut down; yet because the lessee did it in trenching, and the plaintiff had thereby greater advantage, though the jury found for the defendant, yet the Court would not grant a new trial.

#### Wits versus Polehampton.

[Mich. 10 Will. 3. B. R.]

New trial for omiffion of the party refused. 1 Sálk. 273. 6 Mod. 222.

T was moved for a new trial, because the defendant having pleaded a composition, had forgot to carry down witnesses to prove the subscribers' hands; and the

motion was denied, because the debt was honest. And Holt, C. J. remembered where debt on a bond was brought against an heir, who pleaded riens per discent, but the verdict went against him by omitting to bring the settlement to the trial; and the Court being moved, refused to grant a new trial, because it was an honest debt (a).

(a) Per Lord Mansfield, Edie v. E. I. Comp. 1 Bl. 298. The suggestion of furprize is not in all cases a reason for a new trial, but in particular cases it may be. In Spong v. Hog, 2 Bl. 802. the defendant might have given evidence in mitigation, which his counsel thought it prudent to omit; but which procured a verdict for him in another cause at the suit of the same plaintiff: this was held no ground for a new trial. In Gift v. Mason, 1 T. R. 84. it was contended at the trial that certain policies were on an illegal trade; but the judge being of opinion that they were not so on the face of them, directed a verdict in support of them; and a motion for a new trial, to let the defendants into evidence to prove the trading fo notoriously illegal that the plaintiff must have known it, (which was not offered, on a presumption that the jury must have drawn that conclusion,) was refused; as the defendant made the application to supply his own negligence, when it was evident that he was not taken by furprize at the trial.—So in Fortescue 40, anon. a similar application on behalf of a party who had made a mistake on the trial in a point of evidence, which would have encountered the evidence given against him, which mistake was discovered fince the trial, was refused. Vide Rogers v. Stephens, 2 T.R. 718. where Ld. Kenyon said, it would be extremely dangerous to grant a new trial on a fuggestion that the party will make out a better case on a second trial. In Cooke v. Berry, 1 Wilf. 98. and Price v. Brown, Str. 691. new trials were refused to be granted on affidavits of the falsity of the defence which had been made, and that the plaintiff took the plea to be a sham one, or that no defence was expected. In Regina v. Corporation of Helfton, 10 Med. 202.

it was held, that if a point of law be Rarted by the judge, and the counsel do not take it up, but insist on other facts, which are found against them, there ought not to be a new trial on the point of law. A discovery, after the trial, that a witness examined on the other fide was interested, is not a fufficient ground for a new trial, but it may weigh as a circumstance where the merits are doubtful, Turner v.

Pearte, 1 T. R. 717.

A new trial was granted in a case where the defendant's attorney swore that the defendant had gone abroad before E. term, (the cause being tried at the sittings after that term,) and that fince the trial he had discovered, in a memorandum-book of the defendant, a receipt figned by the plaintiff, which was fet forth verbatim. Vide Broadbead v. Marsball, 2 Bl. 955. So where an action was brought for 6000 pagodas, alleged to be deposited by the plaintiff with the defendant, which was fworn to by some Danish failors, and the defendant always denied the whole story, but was not able to contradict the proof at the trial, but moved for a new trial, on the ground that the whole was a fiction, supported by perjury, which he could not be prepared to answer; that since the trial many circumstances had come out to shew the subornation of the witnesses; a new trial was granted after a very strict scrutiny; Fabrilius v. Cook, 3 Bur.

A verdict was set aside when a material witness for the desendant concealed himself in the plaintiff's house, Montpesson v. Randle, Bull. N. P. 328. So where the defendant, having bought goods from the plaintiff, paid him with the promissory note of a third person, to whom the plaintiff repeatedly gave time till he failed, and the plaintiff brought

brought an action on the note and for goods fold, the dispute being, which party ought to bear the loss; but at the trial the plaintiff only proved the sale of the goods, and resuled to produce the note, though he had it in

Court; and the defendant not having given notice to produce it, could not prove it by parol; this being an unfair advantage, contrary to equity and good confcience, Anderson v. George, 1 Bur. 352.

#### 17. Anonymous.

[Mich. 10 Will. 3. B. R.]

New trial or writ of inquiry not granted for too fmall damages, unlefs where there is a trick. Comb. 17, 170.

that upon default it should be lawful for the covenance to enter and take the profits, the desendant pleaded entry and prizal del profits in bar, and judgment was for the plaintiff upon demurrer, and upon the writ of inquiry the jury gave damages, and upon motion a new writ of inquiry was awarded; for debt might have been brought upon this covenant; and this is not like an iffue where the jury are to give no more damages than are proved: But here the jury are to give the whole, unless the desendant proves something in mitigation, which was not done in this case; therefore though the common rule holds, viz. that no new trial, or new writ of inquiry, shall be for too small damages; yet there being a contrivance in this case, it differs (a).

(a) The Court refused to grant a new trial where only 5. damages had been given in an action for a malicious prosecution, and held that there could be no new trial granted on that account, Barker v. Dixie, 2 Str. 995.; or to fet aside an inquisition in an action for maliciously suing out a commission of bankrupt against the plaintiff, and maliciously holding him to bail for 1020 l. whereon the jury only gave 5 l. damages, though it was proved that the costs of superseding the commission amounted to upwards of 30 l. Mauricet v. Breeknock, Doug. 909.

But a new inquiry awarded for too finall damages, where there is a miftake in point of law made by the shetiff, as where a person told the plaintiff he could prove a debt, and after the jury were fworn refused to give evidence, and the sheriff thought he could not adjourn, whereupon nominal damages were given, Markbam v. Middleton, 2 Str. 1259 ; or where the jury have mistaken the law, (the plaintiff and J S. having each deposited 200 l. with the defendant on a contract, which 7. S. not performing, the plaintiff fued tor his deposit, and the jury, on a notion that the defendant could not pay the money without the consent of both parties, having given nominal damages,) Woodford v. Eades, 1 Str. 425. Vide Hayward v. Newton, 2 Str. 940. Tatton v. Andrews, Barnes 448. Anon. 12 Mod. 347.

#### 18. Sparks versus Spicer.

[Hill. 10 Will. 3. B.R.]

ONE was ordered by the judge of affize to be hanged New trial rarely in chains; the officer hung him in private fole; the granted in hard actions. owner brought trespass; and upon not guilty the jury found for the defendant, and the Court would not grant 4 T. R. 468. a new trial, it being done for convenience of place, and v. Brampston, not to affront the owner.

Supra pl. 2.

#### Lord Sandwich's Cafe.

[Trin. 11 Will. 3. B. R.]

HERE there is value or + difficulty, we are bound Trial at bar, of common right to grant trials at the bar. Inqui- where to be sitiones de grossis & pluribus articulis, que magna indigeant nied. Vide paz. examinatione, capiantur coram justiciariis de Bancis. Stat. 625, 644, 649, Per Holt, C. J. Yet Trin. 1 Ann. it was & 051. 1 Vent. Weft. 2. c. 30. denied, because the plaintiff was poor, unless the defend- 702. ant would agree to take nisi prius costs. Et postea, scil. Trin. 4 Ann. B. R., between the trustees of my Lady Sandwich and my Lord Sandwich, though the estate was 3000 l. per annum, a new trial at bar was denied, because Vide Doug. 437. the title of the lessor of the plaintist being from the defend- (420.) 1 T.R. ant himself, there would be nothing to do but to prove the 363. Str. 479.

And. 271. executing of a conveyance.

+ The word or, here, should be and. Per Cur. Com. B. Trin. 2 Geo. 3.

#### Argent versus Sir Marmaduke Darrell.

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 514. S. C.]

N ejectment after a trial at bar, Serjeant Wright moved New trial after for a new trial, because the verdict was contrary to trial at har reevidence; the Court thought so too. Rokeby was for it on ment, because the case in Style, cateri contra; for per Holt, C. J. The not conclusive. reason of granting new trials upon verdicts against evidence at the assizes is, because they are subordinate trials 646. pl. 13.

appointed by West. 2. c. 30., ubi de paucis articulis & faciN. B. Farest. 31 lis est examinatio; and there have been new trials ancient18, 75. S. C. ly, as appears from this: That it is a good challenge to the Carth. 507. juror, that he hath been a juror before in the same cause; Holt 702. but we must not make ourselves absolute judges of law and Vide note to pla fact too; and there never was a new trial after a trial at 27. infra. bar in ejectment, but in case of ill practice ; for the plain- Or a trick. T = 3

#### Trial.

tiss may bring a new ejectment: Upon this a new trial at bar was denied in Sir Richard Temple's case, where the jury found a point of law on the statute of bankrupts, against the opinion of the Court (a).

usually granted where there is a ver-dict for the defendant; otherwise if ment can be brought. Vine 1 Bl. Rep. there be a verdict for the plaintiff: for 348. 4 Bur. 2224.

(a) New trials in ejectment are not in that case the desendant must part

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#### 21. Anonymous.

[Hill. 11 Will. 3. B. R.]

1 Vern. 156. Trial per pais 226, 227, 242.

N affumplit for money won at play, the trial shall not be stayed till an indictment pending for the cheat be tried.

#### Anonymous. 22.

in the Ecclesias-R.ac. antepl. 10. that. 4 Mod. 8.

Trial not put off I N affumpfit the iffue was, married or not married, and for full pending the same point was pending and ready to be determined in the Spiritual Court: And it was held no cause the same matter. to put off the trial, for the Court cannot take notice of

#### Turner versus Barnaby. 23.

[Pasch. 1 Ann. B. R.]

When trial at bar to be moved for. Vide ante 625, 644, 648, & post, 641. at bar.

IF H. would have a trial at bar in Easter term, he ought to move for it in Hilary term; if in Michaelmas term, he ought to move for it in Trinity term, except where lands lie in Middlesex; and anciently there was no other riscen days no-tice before a trial notice given of fuch trial, but the rule in the office; but now there must be fifteen days notice. Per Holt, C. J. (b)

(b) There are diaa in the books title ex dem. Revett v. Braham, was that there cannot be a trial at bar in an tried at bar in Hilary term, 32 Geo. 3. issuable term; but the case of Good- 4 T. R. 497.

S. P. Fare 1. 53, 64. Vide 6 Mod. 222, 242.

#### 24. Anonymous.

[Mich. 1 Ann. B. R.]

New trial shall be granted if the judge of nisi prius mil-New trial for direct the jury +, because those trials are subject to the misdirection. 2 Will. 269. inspection of the Court. Per Holt, C. J. + Or allow, or ever-rule evidence. 7 Mod. 64.

#### Clerk versus Udall.

S. C. Farefl. 106.

[Mich. 1 Ann. B. R.]

PON a trial at nish prius the jury gave excessive da- New trial for exmages, and for this cause a new trial was granted (a). ceffive damages, and the same da-The second jury gave the same damages again, and a se- mages given, and cond new trial was moved for, and denied, because there third trial reought to be an end of things; but feveral cases were cited 6 Mod. 22, 242. which the Chief Justice allowed, that where upon the se1 Lev. 97. 1 Sid.
cond trial the jury have doubled the damages, a third trial 131. Comb. 17, had been granted (b).

(a) In actions for tort, where the damages depend upon sentiment and opinion, the Courts will not grant a new trial on the ground of excessive damages, unless it appears that they are flagrantly outrageous and extrawagant. Therefore they have refused to interpose when 3001. was given for a few hours false imprisonment, Leeman v. Allen, 2 Wilf. 160. Huckle v. Momey, id. 205.; or 1000 l. to an attorney for falle imprisonment, by a king's messenger, for six days, Beardmore v. Carrington, 2 Wilf. 246.; or 2001. to one merchant against another for a flight affault, accompanied by ungentleman-like behaviour, Grey v. Grant, M. P. 2 Wilf. 252.; or 5001. against a custom-house officer, for an unsuccessful search for prohibited goods, Sharpe v. Brice, 2 Bl. 942. Vide also Benson v. Frederick, 3 Bur. 1845. where 1501. damages to a militiaman against his colonel for unlawful corporal punishment; Fabrigas v. Mostyn, 2 Bl. 929. where 3000 /. in false imprisonment; Leith v. Pope, 2 Bl. 1327. where 1000 l. for malicious prosecution; Gilbert v. Burton/baw, Cowp. 230. where 400 l. for the like injury; Ducker v. Wood, 1 T. R. 277. where 1501. for an assault,-were held not excessive damages; but in all the preceding cases it was afferted, that the Court were not precluded from granting a new

trial for excessive damages, where they were manifestly unjust, and an evidence of passion or partiality in the jury.

In Wilford v. Berkeley, 1 Bur. 609. where 500 l. damages were given for crim. con. against a clerk with a salary of 50 l. the Court refused to grant a new trial, and seemed to think that in that action it could not be done; and in Duberly v. Gunning, 4 T. R. 651., 5000 l. damages being given in a fimilar action, Lord Kenyon, and Albburft, J. thought a new trial could not be granted, there having been no precedent, though the damages, under the circumstances of the case, were enormous. Buller, J. thought there should be a new trial. Grose, J. thought that the case did not require a new trial; but did not deny that a case of such an action could exist which might warrant the interference of the Court. In Jones v. Sparrow, 5 T. R. 257. a new trial was granted for excessive damages (40%) in affault; and Lord Kenyon said, It must be remembered, that, although Duberly v. Gunning was decided after a very full discussion of the subject, the Court were not unanimous in their determination; but whether rightly or not decided, that is a case fui generis, and cannot govern the present.

(b) Vide Str. 691. 2 Wi 1 T. R. 277. 4 Bur. 2108.

S. C. Farefi. 84, 26. The Case of the Mayor and Aldermen of 85, 2 Salk. 201.
pl. 4. 3 Salk.
363. Holt 184.

Bristol.

[Mich. 1 Ann. B. R.]

No new trial in inferior courts. I Salk. 148,149. 396. Faresl. 38.

I T was held by the Court, that a new trial cannot be granted in an inferior court; for they are not like trials by nist prius, which are subordinate upon writs issuing out of this Court, over which the Court have authority and inspection; but this was a new trial a year after the first, which the Court blamed (a).

(a) R. Brooke v. Ewer, Str. 113. that an inferior court could not grant a new trial for excessive damages; but where, after issue joined, or notice of trial given, there is a reference, and the plaintiff afterwards proceeds by surprize, such Court may grant a new trial, Jewell v. Hill, Str. 499. Street's Case, 7 Vin. 24. In the latter it is said, that though an inferior court cannot grant a new trial after a cause hath been fully heard, yet where a verdict is obtained through surprize, or by any irregularity, it may be set

aside. Vide ac. Bayley v. Boorne, Str. 337. Rex v. Peters, 1 Bur. 571. Blaquiere v. Hawkins, Doug. 378. In Rex v. Urling, Fort. 198. It was held, that such Court might set aside a writ of inquiry or judgment, though strictly regular, if obtained by fraud or surprize; and in Rex v. Peters it was ruled, that a regular interlocutory judgment, though there appeared no fraud or surprize, might be set aside in an inserior court, in order to let in a trial on the merits.

S. C. 1 Salk. 258. Ante 253. Farefl. 70, 121, 156. Helt 263, 266.

#### 27. Fenwick versus Lady Grosvenor.

[Hill. r Ann. B. R.]

New trial denied after trial at bar-5 Mcd. 88, 350.

Gay & Cross, Farell. 37. 6 Mod. 18, 22, In ejectment after a trial at bar, a new trial was moved for, on affidavits that feveral witnesses absented themselves in Holland, by reason of a report spread abroad there, that one of the desendant's witnesses was confined by imprisonment; but it was denied, because it did not appear that the plaintiss did spread it, or occasioned the spreading of it. The Court was distaissed with the verdict, but cited Gross's case for a salse return of a mandamus tried at bar, and by consent of all sides one point was to be found specially, yet the jury found a general verdict, and the Court would not grant a new trial (b). It has never been done here but upon issues out of Chancery, which being only to satisfy the conscience of the Chancellor, are not spricti juris. So a new trial was denied, contra opinionem (ut videbatur) capital. justiciar. (c)

(b) Vide Rep. B. R. Temp. Hard. 23. Eynon, 1 Bur. 395. Of late years new (c) Per Lord Mansfield, Bright v. trials have been granted, not only after trials

trials at nisi prius, but also after trials at bar; and it is at least equally reasonable to grant them after trials at bar, as after trials at nife prius, (if the justice of the case demands it,) or indeed rather more so, as the latter must be done upon what could have actually

and personally appeared to a fingle Judge only; whereas the latter is grounded upon what must have manifettly and fully appeared to the whole Court. For instances of new trials after trials at bar, vide Str. 584. 2 Ld. Raym. 1358. 1 P. Wms. 212.

#### 28. Ashwin versus Corbill.

[Mich. 2 Ann. B. R.]

F a cause hath lain at iffue four terms, and no proceed-ing, there must be a full term's notice of trial, exclud-the term wherein iffue was inited.

A term's notice.

Vide ante 624.

6 Mod. ing the term wherein issue was joined.

#### Lazier versus Dyer.

S. C. ante 457. 6 Mod. 57.

[Mich. 2 Ann. B. R.]

T came to be a question, Whether the suing out of a Suing out a vevenire or distringus, after the expiration of the four the last day of terms, was a proceeding within the term; because it bears the term, not a teste the last day of the term, and has relation to the term? proceeding with-And the Court held it was not; for though it be legally a tice of trial. proceeding of the term, yet it is not so in fact. Et nota; 181. Rep. 215, Where it is an iffue out of Chancery, notice of trial to the 287. 3 Bur. folicitor in that court is good; for as to this, they are but 1241. as one court.

#### Sir Samuel Astrey's Case.

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[Hill. 2 Ann. B. R.]

UPON a feire facias brought against Sir Samuel Astry, Trials at bir not for his place of clerk of the crown in the court of denied to officers of the court, or King's Bench, and iffue joined thereupon; Sir Samuel barrifters. Vide Aftry moved that the issue might be tried at the bar. The ante 625. 2 Keb. attorney-general opposed it; but the Court said a trial at 133, 161. 1 Cro. bar was never denied to any officer of the Court, nor 1 Sid. 407. hardly to any gentleman at the bar: And though Mr. Attorney was never bound to consent to a trial by nife prius in the queen's case, yet they did not see how he could refuse a trial at bar, where it was reasonable to try it there; for the statute West. 2. cap. 3. is atterminentur, that they may be determined there, que magna indigeant examinatione.

S. C. 6 Mod-194. 3 Salk. 381. Holt 705.

## 31. Way versus Yally.

[Trin. 3 Ann. B. R.]

If the principal cause be within the jurisdiction, and an issue depending on foreign laws arises, it may be tried in the next county, and foreign laws given in evidence. See 1 Lev. 143. 6 Mod. 218. I Jon. 43, 44. 2 Saund. 238. Hob. 37. 1 Cro. 143, 183. 1 Co. 2. 1 Saund 238. 1 Vent. 59, 286. Hob. 233. 2 Cro. 76. 1 lnft. 261. b.

Cowper 181. 7 Co. a. a. Str. 776.

ESSOR brought debt for rent against his lessee, upon a demise at London, of lands in Jamaica. The defendant pleaded to the jurisdiction of the Court, that the matter ought to be tried in Jamaica; and it was urged that the lessor cannot bring debt here against the assignee of a term of lands in Ireland, and that if entry and oufter were pleaded, it could not be tried here; and in this case the right of the plaintiff and defendant depends on foreign laws which cannot be given in evidence here. Et per Cur. Where an action is local it must be laid accordingly; therefore if the lessor declares on the privity of estate, and that lies in Ireland, the action must be brought there, for the estate is local; therefore such lessor cannot maintain debt here against an assignee of a term in Ireland; for the action is founded on a privity of estate (a). Otherwise where it is founded on a privity of contract, which is transitory; as debt for rent by lessor against lessee; for that may be maintained where the land lies not. Here it is by the leffor against the leffee on the privity of contract; and if a foreign issue, which is local, should happen, it may be tried where the action is laid; for that purpose there may be a suggestion entered on the roll, that such a place in fuch a county is next adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon nil debet pleaded you may give the laws of that country in evidence.

#### (a) Vide ac. 1 Wilf. 165.

S. C. 1 Salk.
380. 6 Mod.
245. Rep. A.Q.
33.
Trial by proviso cannot be in the

33.
Trial by proviso cannot be in the case of the crown; nor nisi prius, unless by warrant from the Attorney general, 6 Mod. 246, &c. infra.

32. Domina Regina versus Sir Jacob Banks.

[Mich. 3 Ann B. R. 2 Ld. Raym. 1082. S. C.]

SIR Jacob Banks was indicted at the quarter-sessions in Berks, and the indictment was moved hither by the prosecutor, and now both the prosecutor and desendant made up the record, took out process, and carried down the cause to trial at the assizes; and the desendant put in his record first, tried it, and was acquitted: The prosecutor upon this moved for a new trial, and had it.

Et per Cur. 1st, Before the 5 & 6 W. & M. c. 11., and 8 & 9 W. 3. c. 33. H. indicted in any county might remove it into B. R. by certiorari, and never was bound by recognizance to try it, unless in London and Middleses:

hat

that by this means the defendant was out of court, & fine die, and new process was to be awarded, on which he might be outlawed, unless he came in gratis, which occasioned great delay, and was the cause of making those acts.

adly, That removals by defendants are provided for, Upon removal of but removals by profecutors are not within those acts; and indictment by that this removal being before the plea pleaded, the de-the profecutor, fendant was out of court & fine die, but may come in gra- comes in by protis, or be brought in by process; and in the last case on cess, he shall pleading shall give security to try it, which he is not obliged try. to do when he comes in gratis.

3dly, That in civil actions the defendant shall never in what cases the carry down a cause by proviso, till there be a laches in the defendant may plaintiff; except in causes where the defendant is as a cause by provise. plaintiff, as in replevin, prohibition, quare impedit, [against 2 Lev. 5, 6, &c. the patron only,] which are to have return, consultation, infra. 6 Mod. and writ to the bishop.

4thly, There can be no trial by proviso in a cause of the 336. crown, because there can be no default nor laches, nor can the crown be compelled to try any cause by nisi prius; and therefore every cause of the crown in this court must be tried at bar, unless the attorney-general allows a warrant of nise prius, which implies his consent to try the cause in the country.

5thly, That as in indictments of treason or felony, if the attorney-general will delay, the Court may give the defendant leave to bring on the trial as they fee fit (and so it has been done): So in indictments for misdemeanors, as in this case; the desendant may in the first instance, by the confent of the profecutor, and leave of the attorneygeneral, carry down the cause to trial; but it shall not be allowed by surprise on the attorney-general, as here in this case, and also without consent of the prosecutor, or any default in him.

6thly, It was ordered to be a rule hereafter, that when an indictment is removed hither by the profecutor, the defendant shall not carry it down to trial without leave of the Court on motion.

240. & 123. Savil 2. 2 Sid.

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#### Highmore versus Walker.

[Mich. 4 Ann. B. R.]

N a cause to be tried at the sittings, the defendant en- Two days notice tered a ne recipiatur; and the question was, Whether to be given after ne recipiatur at the plaintiff could go on at the next fittings without a new fittings. notice? It was agreed, that if no ne recipiatur had been entered, there must have been two days notice. The clerks

6 Mod. 247.

upon the principal question thought no notice necessary; their reason was, because the defendant himself had hindered the plaintist's proceeding, and therefore ought at peril to attend the next sittings. But Holt, C. J. contra. The notice fell to the ground with the trial: A rule was made, that where a ne recipiatur was entered, the plaintist shall give notice the same sittings, and before they are over, that he will proceed to trial the next sittings: And it was said, that if a cause be not entered two days before the sittings, the defendant may enter a ne recipiatur.

#### 34. Dunkly versus Wade.

[Pafch. 5 Ann. B. R.]

Hard action.
Vide ante 644,
648. pl. 18.
Rep. B. R.
Temp. Hard.
201. Note to pl.
3. supra.

I N case for negligently keeping his fire, a verdict was found for the plaintiff, and a new trial granted. But per Cur. Had a verdict been for the defendant, we would hardly have granted a new trial, because it is a hard action.

\$. C. Fares. 256, 157.

35. Ford versus Tilly.

New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Ante 645. I Salk. 258, 273. Hardr. 71, 821. I Wilf. 93.

A N inquiry found four voluntary escapes, for which Ford, warden of the Fleet, forseited his office. Issues hereupon were tried in B. R. at the bar. One escape was proved by a witness, who was asked if he was never burnt in the hand for stealing a tankard? he answered, No (a). A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1st, Because it was a trial at bar (b). 2dly, It is no reason for a new trial that you for the desendant came not prepared; and the Chief Justice said Soam's case was a hard case. Vide 3 Keb. 365, 369. 2 Lev. 114. Postea, Pasch. 4 Ann. B. R., between Cockerast and Smith, that the party's evidence was not ready, was held no reason for a new trial, though at nist prius: And a new trial was denied (c).

(a) The question seems such as a witness ought not to be asked. Besides, a person convicted of selony, who is admitted to his clergy, and burnt in the hand, is thereby re-

enabled to be a witness. Vide 2 Hawk. ch. 46. s. 20, 21.

(b) Vide note to pl. 27.
(c) Vide note to pl. 16.

## Trover and Convertion.

Ante 597. 1 Lev. 90. 2 Ltv. 201. 3 Lev. 336. 5 Mod. 182, &c. 6 Mod. 151,170, 212. Vide Moc . 156. Yelv. 68.

#### Arnold versus Jeffreyson.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 275. S. C.]

ROVER de scripto suo obligatorio per quod tent. & obli- Trover descripto gat. fuit cuidam J. S. In arrest of judgment after good S. C. verdict for the plaintiff, it was held good; for it might be 3 Salk. 247. given to the plaintiff, and so shall be intended, and then Holt 498. it was scriptum suum; and it is no absurdity, though it were made by him to another; for it is only a description of the deed.

#### Hartford versus Jones.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.]

N trover and conversion the defendant pleaded, that the Special plea in goods were cast away, and they saved and detained trover must confess a conversion. them till they were paid for their pains. On demurrer, Lutw. 1538. Holt, C. J. held, that they might retain for payment, as a 1 Mod. 244carrier for his hire; and falvage is allowed by all nations:
S. C. 3 Salk.

He that ferves another ought in reason to be paid for his Eliz. 435.

fervice; but the plea is naught; for if the detainer be lawLatch. 185. ful, he does not confess a conversion: I never knew but 1 Rol. Rep. 1. Kehle 100 one special plea good in trover, viz. Yelv. 198. (a) And Hutt. 10. Ante the rule was in the principal case, to waive the plea and 516. plead not guilty. Vide 2 Cro. 68, 69. 3 Cro. 262.

the defendant took the wine mentioned in the declaration for prisage due to the king. The following pleas in trover have been also held good: A former recovery in trespass for the same goods, Show. 146.; a recovery in trover

(a) The plea in Yelverton was, that against a stranger, Cro. Jac. 73.; or against the defendant, 2 Str. 1078.; that an innkeeper detained a horse for his meat, 2 Bulft. 289.; the Statute of Limitations, Lat. 99. Vide Bull. N.P.

#### Hartford versus Jones.

[Pasch. 10 Will. 3. B. R. 1 Ld. Raym. 588. S. C.]

TROVER for twenty ounces of cloves and mace; Trover for 20 after a writ of inquiry on a judgment by default, Holt, ounces of cloves C. J. doubted whether it was good, because it was not without shewing faid,

#### Trover and Conversion.

how much of were mixed, ill Vide 5 Mod. 181, 324. 1 Lev. 48. 3 Lev. 18. 2 Vent. 67. 3 Mod. 70. 4 Mod. 324. 5 Mod. 324. 1 Sid. 60, 445. 1 Lev. 48. Farefl. 142. \*[655]

faid, how much cloves and how much mace; or that it each, or that they was fo many ounces commixt.; but he faid these were inindetinue. Quær. certainties, and that if this was comprised in another action, this recovery would be a good plea in bar. In detinue, this would be ill for incertainty; for the sheriff 2 Lev. 85, 176. could not tell how much of one and how much of the other to deliver. The Court gave judgment for the plaintiff, without taking notice of another \* exception, viz. that it was also pro viginti parvis instrument. carpentar., vocat. twenty small carpenter's tools. 2 Saund. 74. 2 Ven. 78. Style 358, 360, 370, 419. 1 Mod. 289. 2 Ven. 77. 1 Mod. 46. 1 Vent. 317. 2 Saund. 74.

# Anonymous.

[Trin. 3 Ann. Ccram Trevor, C. J. At nife pries at Guildhall.]

Where trover will lie against a carrier. 1 Mod. 333. 1 Danv. 21. 6 Mod. 212. 2 Ld. Raym. 792.

2 Str. 576. 2 Wilf. 328.

TROVER lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong; as 30, 31. Comb. if he break it to take out goods, or fell it. Per Cur. Pasch. 7 W. 3. B. R. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion. Per Trever, C. J. (a)

Where denial is a conversion. Vide 10 Co. 56: 1 Cro. 262. 1 Lev. 173. 1 Danv. 21. 2 Mod. 245. 3 Mod. 2. (1 Mod. 244.) 5 Mod. 426. 2 Show. Caf. 148; 175, 213.

(a) R. ac. Ross v. Johnson, 5 Bur. 2825. that trover would not lie against a wharfinger from whose possession goods had been stolen or lost. It will lie against a captain of a ship for delivering goods against an express direction to a wharfinger, on account of a claim of wharfage which is not made out, Lucas v. Hay, 4 T. R. 260. For the general nature of the action, vide Cowper v. Chitty, 1 Bur. 20. Note to 3 Salk. 367.

# Tithes.

See 1 Mod. 229. 6 Mod. 261. 4 Mod. 336, &cc. S. C. 4 Mod. 336 to 344.

#### Hick versus Woodson.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 137. S.C.]

IN attachment fur probibition, the plaintiff declared of a County or home custom in such a hundred, to pay no tithe for agistment scribe in a non of cattle barren. Issue was taken upon the custom, and decimando for found for the plaintiff, but judgment was arrested with this things titheable entry, et quia apparet curia domini regis hic quod confuetudo of common right; otherwise pred. nullius vigoris in lege existit, ideo fiat consultatio, &c. if not titheable Et per Cur.,

1st, Tithe of agistment is due of common right, because right. Tithe of agistment of barthe grass, &c. which is eaten, is de jure titheable, and must ren cattle due of have paid tithe if cut at persection. And the Court took common right.
Vide Faress. 113.

this difference, viz.

That a hundred or a county cannot prescribe in a non 141, 142.

decimando, for a thing that is in its nature de jure titheable; Carth. 392.

Comb. 403. for, as no one fingle person, or his estate, can; no more, Skin. 560. Hoke by the same reason, can the hundred, which consists but 671. Caies B.R. of many fingle persons estates. Vide March 26. 1 Ro. 1111.

Ab. 653

But of things which in their nature are not titheable de jure, a hundred or county may prescribe in a non decimando, because they are discharged in such case without a cus341. Lutw. tom to the contrary, and they do but infift on their ancient 1316. right, and that custom hath not prevailed against it: Ergo Farest. 113,137. the case of wood, 1 Ro. Ab. 654. Lit. Rep. 152, 153., and the hearth-penny, which is but a modus for it, they allowed to be good law; because wood is not in its nature tithe- Pal 37. a Int. able, nor within the reason of titheable things, which 645. come not to perfection every year.

of common 137. I Saund.

#### Hill versus Vaux.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 358. S. C.]

Vide 6 Mod. 251. S. C. called Leicester versus Foy. Ante 554.

ON a fuit in the Spiritual Court for tithe of milk, the Carth 461. S.C. plaintiff moved for a prohibition, suggesting a custom Modus to pay a in the parish, that the 9th day of May at night, and the milk such a day, 10th day of May in the morning, the parson was to have and every 9th the whole meal's milk, and so every 9th and 10th night and 10th night

and morning at-

and

heard to bleat, in lien of tithe of to pay part of the very thing that is tithe, not good, unless payable in another manner. Lat. 222. 6 Mod. 251. Raym. 277. 1 Mod. 229. Cafes B. R. 206. Helt 672.

ter, till a young and morning, till a young lamb yeaned should be heard to bleat, in lieu of all tithe of milk. And the case of thirty eggs, in lieu of all eggs, was cited 1 Ro. Ab. 648, 651. milk, ill. Modus Et per Cur. A modus to pay one thing for another, or a part of the same thing in another manner, may be good; but a prescription to pay part of the very thing that is tithe, can never be a good modus, unless payable in some other manner, so that the parson has a benefit by it. 3 Cro. 609. 2 Cro. 47. 1 And. 799. Mod. 229. Hob. 250. Raym. 277. 3 Bulft. 326. (a) As to the case of the thirty eggs, he is bound to pay that, whether he has hens or no, and he must pay it at a certain time. But by this modus the parson may have nothing; as suppose a lamb be heard to bleat before the 9th of May.

#### (a) Vide also Bunb. 307.

#### The Archbishop of York versus the Duke of Newcastle.

[Mich. 3 Ann. In Scace.]

Modus of ten fleeces of wool and two lambs. for all tithe: Court divided whether good or not. Vide 1 Mod. 321.

H. Prescribed to pay ten sleeces of wool and two lambs in lieu of all tithes; and Price and Bury, Barons, were of opinion this was an ill modus, because it is one species of tithe for another, and there is great incertainty; for one fleece may be twice as big, and three times the value of another. Vide 2 Lutw. 1052. 3 Cro. 786, 276. Mo. 909. 1 Ro. Ab. 649. Dy. 149. Hard. 174. Ward, Chief Baron, and Smith, Baron, contra. 1st, A modus is nothing but a real composition, for or in lieu of tithes, or an annual profit certain and permanent; and they held that the payment of any one chattel for tithe, was or might be a good modus as well as money; for why might not the parson originally agree to take ten fleeces for his tithe, as well as a penny? They admitted that payment of tithe of one species, or payment of a modus for one species of tithe, could not be a discharge as to another species; but they held that this was not a payment of tithe, nor a payment for a species of tithe; because it was to be paid at all events, whether there be sheep or no: And they denied the case of 1 Ro. Ab. 651., and held it no more uncertain than to pay a modus of ten cheefes, which may differ vailly, both in nature, quantity, and value; and it tends to the disquiet of the country to break in upon customs and usages; and it ought not to be done but on plain and manifest reason.

## [657]

Payment of tithe of one species not a good modus for all. Cro. El. 446. Moor 277, 445. Lutw. 1048, 1051.

## Startupp versus Dodderidge.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1158. S. C.]

A Modus to pay 2 s. in the pound of the improved rent in Modus to pay lieu of all tithes, was held naught; for that is to rife of the improved and fall as the land is let, and the parson cannot know it: rent, ill. Modus And though a custom to pay the double value for a fine should be as cermay be good, yet that arises to a man's contract, which tain as the duty destroyed by it. shall never be void where it may be reduced to any cer- See Lutw. 1043 tainty, and differs from this case of a modus, which ought to 1053. &c. to be as certain as the duty, which is destroyed by it. Supra Ante 551. Holt, C. J. dubitante, upon a motion for a prohibition (a). 60. Lilly Ent. 19.

(a) The modus was also held void Ld. Raymond. The same modus was on application to the Common Pleas likewise held bad, 1 Ld. Raym. 696. and Exchequer. Vide the report in Vide 3 Atk. 245, Burn Ecc. Law, 421.

## Hariance.

[ 658 ]

## Bragg versus Digby.

[Pasch. 10 Will. 3. B. R.]

I N case on several promises by original, the defendant, without craving over of the writ, pleaded variance between writ and count not pleadtwixt the writ and the count, shewing particularly where- able without in: And the plaintiff demurred; and it was adjudged that craving over of the defendant should answer over; for he ought to have vide ante 497. demanded oper of the writ before he could take advantage and post. 701. of the variance; because though the writ is in court, [the 3 Lev. 236. count, yet being not upon the fame roll with the count, i Saund. 118.
6 Mod. 303.
the defendant cannot plead to it without demanding oper (b). S. C. Cafe, B.R.

189. Andrews 76.

(b) R. ac. 2 Wilf. 85, 295. But oyer not been craved, Boats v. Edwards, as an original is not now granted, and Doug. 227. Vide Rex v. Amery, 1 T. R. the plaintiff may proceed as if it had 150.

#### Clariance.

#### Holman versus Borough.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 791. S. C.]

ed dated in : year of our nd fet forth Vide Cro. Jac. Rayon 335.

N covenant, the plaintiff declared of a deed of covenant, bearing date the 30th of March anno Domini 1701, th the year of annoq; regni Willi. tertii nunc regis Angl., &c. decimo terte king also, no tio, and makes a profert of the deed, with a cujus dat. est ariance. Vide Cro. Tac. eisdem die & anno: Upon over craved, the deed was dated only thus, viz. the 30th of March 1701, wanting anna Domini, and likewise anno regni. And though it was demurred to for the variance, the Court held it no variance, for it was implicitly in the deed. Vide 41 E. 3. 23.

S. C. Fat. 87. Holt 200.

#### Incledon versus Crips.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 814. S. C.]

In debt, where the quantity of the duty depends coon the deed, and cannot be helped by remittitur; otherwise extrinsic 1 Salk. 339. 1 Lutw. 459, 539. 2 Vent. 129. 1 Show. 3, 9. Cro. Car. 137, 436, 437. 1 Saund. 282, 285. Fatell. 143, 148. 5 Mod. 213. 1 Sid. 407. Vide Bur. 2231. Doug. 6. 1 H. Bl. 249.

IN debt, the plaintiff declared on a deed, whereby the defendant covenanted to pay the plaintiff 35 1. per hundred for every hundred of wood in such a place, and that variance is fatal, he delivered so many hundreds and one half, which came to 182 1. 10 s. The defendant demurred. Et per Cur.

There can be no apportionment, and the demand for the where on matter half hundred is demanding more than can be due by the contract; and then the question was, Whether a remittitur could be entered for that, and judgment given for the

rest? Et per Holt, C. J.

 Where the fum demanded depends on the deed itself, and on nothing extrinsical, as in case of debt or covenant to pay 20 l., there can be no remittitur; for the variance is inconfistent with the deed upon which the duty that is demanded entirely depends; otherwise where it may be more or less by matter extrinsic; as in debt for rent, or in the case at bar; in that case, if more be demanded than is due, it may be remitted; for the variance is not inconfistent with the deed: And as the plaintiff is to recover on trial what appears on evidence to be due; fo on demurrer he is to have judgment for no more than he ought to recover, and may remit the rest. Vide Hob. 178. Dy. 65. Yelv. 66. 10 H. 6. 5. 1 Saund. 206, 286.

Vide ante 564, 600. 6 Mcu. 42. 832. Far. 120, 121. 4/2/6/21/110

\*[659]

Vide Str. 1089.

Doug. 6. Bur.

# Chetley versus Wood.

[Mich. 2 Ann. B. R.]

Recognizance in N debt upon a recognizance, the plaintiff declared as C. B. taken at a N managing and a support of C. on a recognizance acknowledged in the court of Com-Judge's chammon Pleas, caram G. Treby, mil. & sociis suis ; nul tiel reber pleaded as cord cord was pleaded, and the record produced was a recogni- taken in court; zance taken before Mr. Justice Nevil, at his chambers in variance. Lutw. 1287. S. C. Serjeants Inn, and by him brought and delivered into court; and it was adjudged that the plaintiff has failed of Holt 612. his record: For the record is such as it is entered upon the bail in C. B. roll, and in pleading must be so described: Accordingly binds from the the court of King's Bench do enter all recognizances as caption, in B.R. taken in court, but the Common Pleas enter specially : To from the entry only. Mod. Cases that their recognizances bind from the caption, ours from 42. S. C. 1 Cro. the time of entry; also upon theirs a fire facias lies in 312. Hob. 195. either county; but on a recognizance in B. R. in the county of Middlesex only; therefore these differ in substance; and as to the usage of declaring this way, which was infifted on, the Chief Justice said it was against law.

#### Roberts versus Harnage.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1043. S. C.]

N debt upon a bond, the plaintiff declared, quod cum Bond to A. in the defendant apud London., viz. in paroch. beata M. 401. folvend. to his attorney, derie de Arcubus in warda de Cheape per scriptum suum obliga- clared on as paytorium concessisset se teneri to the plaintiff in 40 l. solvend, to able to A. and no the plaintiff, &c.; the defendant craved oyer, and the bond 6 Mod. 228. was to the plaintiff to pay 40% to his attorney or his assigns; and was dated at Port St. Davids in the East

The defendant pleaded these variances in abatement, and upon demurrer the Court held,

1st, That the first was no variance; for payment to the plaintiff or his attorney is the same thing. The teneri made it a debt to the plaintiff, and in consequence it may be paid to him; a folvendum to any body else would be repugnant. Vide 4 Ed. 4. 29. Sid. 295. 2 Keb. 81. But payment to the plaintiff's attorney or his assignee is the fame thing.

[ 660 ]

adly, The fecond variance was held fatal, though it was objected that the place was only used as a venue, for the dating made the bond local; and it is not a bond dated at London, because there is an express date at Port St. Davids; but the plaintiff might have declared, that the defendant apud Port St. Davids in the East Indies, viz. apud 1 Str. 622. London. in paroch., &c., for that was only using London, &c. for a place of trial. Broderick pro quer. Parker pro def. (a)

(a) A party is not bound to flate to flate the substance and legal effect, the material parts of a contract in which is not liable to misrecitals and words and letters; it will be sufficient literal missakes, Brissow v. Wright, U 2

## 7. Domina Regina versus Dr. Drakc.

[Mich. 5 Ann. B. R.]

Information for a libel, variance in the wird mor for mot held fatal upon evidence. See 6 Mod. 168. Raym. 74. Tenor imports a true copy. 1 Keb. 531. Fared. 201. Hob. 59a. 1 Sid. 148, 153, 217. S. C. 3 Salk. 224. Rep. A. Q. 78, 84, 95. Holt \$47, 349, 350, 425.

[ 661 ]

In declaring for

variance in omis-

the words proved

are actionable;

otherwife in te-

written.

fron or addition not material, if

words spoken,

INFORMATION for that the defendant being evilly disposed to the government, did make a libel, in which libel were contained divers scandalous matters fecundum tenorem fequent., and in setting forth a sentence of the libel, it was recited with the word nor instead of not; but note, the sense was not altered thereby. The desendant pleaded not guilty; and this appeared upon evidence, a special verdict was found. Et per Curiam,

1st, Cujus quidem tenor imports a true copy. Vide Reg. 169. 8 Co. 78. Co. Ent. 508. 2 Saund. 121., in hac que sequitur forma, 5 Co. 53., tenor is a transcript, and im-

plies the very same.

adly, They held that this was not a tenor, by reason of this variance; for not and nor are different; different in grammar and different in sense. And Powys, J. held as to the point where literal omissions, &c. would be fatal, that where a letter omitted or changed makes another word, it is a fatal variance; otherwise where the word continues the same (a): And in the principal case, no man would

fwear this to be a true copy.

3dly, The Court held, that there was a difference between words spoken and words written; of the former there could not be a tenor: for there was no original to compare them with, as there is of words written; and though there have been attempts to plead a quorum tenor of words spoken, it has never been allowed; and therefore where one declares for words spoken, variance in the omission or addition of a word is not material; and it is sufficient if so many of the words be proved and sound as are in themselves actionable. Vide Dy. 75. 3 Cro. 503. Hard. 470. Otherwise in debt upon a bond; for upon non est factum any variance is statal.

In pleading a libel may be fet forth in hæc verba, or by the fenfe and fubfrance of it. non est fazium any variance is fatal.

4thly, Holt, C. J. held, that in pleading there were two ways of describing a libel or other writing, by the words or by the sense: By the words, as if you declare of a libel cujus tenor sequitur, &c., or que sequitur in bis Anglicanis verbis sequentibus, you describe it by its particular words, of which each is such a mark, that if you vary you fail in making good their description. Vide Dy. 203. If a man bring trespass quare clausum fregit, and sets forth abuttals and bounds, and fails in proving them, he is gone; and yet he needed not to have described it after that

(a) Cited and r. acc. Cowp. 229. Vide Str. 229. Doug. 194.

manner.

manner. 2dly, You may describe it by its sense and meaning; thus it is a good information to shew, that the defendant made a writing, and therein faid so and so, translating it into Latin; in which case, exactness in words is not so material, because it is described by the sense and substance of it.

### Merdias.

**[ 662 ]** Vide Co. Lit. 226. 1 Saund. 230. 2 Saund. 97, 271, 255. Raym 193. 5 Mod. 351.

#### Buxendin versus Sharp.

[Pasch. 8 Will. 3. C. B.]

HE plaintiff declared that the defendant kept a bull S.C. 3 Salk, 12. that used to run at men; but did not say, sciens or Vide 2 Str. scienter, &c. This was held naught after a verdict; for Cowp. 826. the action lies not unless the master knows of this quality, Doug. 65%. and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.

#### Jenkins versus Turner.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 109. S. C.]

THE plaintiff declared that the defendant kept a boar Action for keepad mordend. animalia confuet., and knew of this habit, ing a boar ad mordend. animal and that the boar did bite, &c. This was held good after lia confuet. held verdict, though it was objected that these animals may be wellaster verdict. frogs or mice, &c., for we must intend there was proof of 1 Show. 539. biting fuch animals as will support the action, otherwise s.C. 3 Salk. 13. the judge and jury would not have concurred in this verdict, whereby the plaintiff recovers damages: And as to another objection, viz. that the defendant cannot know what animals he is to defend against; it was answered, that no evidence can be given of killing any animals but what he has knowledge of.

## Acton versus Eels.

[Mich. 8 Will. 3. B. R. Comyns 12. S. C. called — and Blackall v. Heal and others.]

Damages given in trespass laid at a time not intended another time was proved. Vid. 1 Med. 292. (S. C. Cart. 389. 5 Mod. 286 6 Mod. 102.)

**[** 663 ] Vide Doug. 61. Bur. 1159.

IN trespass for affault and battery, and verdict for the plaintiff, it was moved in arrest of judgment, that the come, it shall be time laid in the declaration was not yet come. Et per Cur. Then it is a time impossible, and the jury must be supposed to give damages for another trespass; and it is as if no time had been alleged; otherwise if the time had been laid after the action, and before the verdict, for that shall be intended to be the trespass that was given in evidence, and that was after the action brought; and so it is where it appears that the jury give damages for a time not come, as in 2 Saund. 169., where the contrary cannot be intended, 3 Keb. 304. in point. Judgment for the plaintiff. Then Northey moved that they might have leave to enter Gib. C. B. 131. the judgment as of the preceding term, because the plaintiff died since the verdict. Curia, Enter it as you can, but at your peril, we give no leave nor directions about it.

#### Roe versus Gatehouse.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 145. S. C.]

Incertainty in count cured by verdia. Vide 1 Lutw. 899. 1 Saund. 154, 155. 2 Saund. 171. 2 Vent. 141, 142, 196. Carth. 379. S. C. I Lutw. 234. 6 Mod. 227, 268, &c. Farefl. 143. S.C. 5 Mod. 305. 3 Lev. 55. 1 Sid. 309. 1 Saund. 6, 7. Comb. 404. 1 Salk.26. Str. 703. 2 Ld. Raym. 1526.

ASSUMPSIT, quod cum the defendant was indebted to him in 5 l. for money lent, and promifed to pay; cumq; etiam at the request of the defendant the plaintiff found horse-meat for J. S. super se assumpsit; and says not that the defendant super se assumption. A verdict being for the plaintiff and entire damages, and a writ of error brought in B. R., relying upon 3 Cro. 913. and Noy 50., for J. S. might as well be the person promising as the defendant; and the promise is the gist of the action; and an incertainty in that cannot be cured by intendment after verdict. Sed per Cur. It being faid positively at first, that the defendant super se assumpsit, and then cumq; etiam, &c., the fame nominative shall go to all the promises; and, by reafon of the word etiam, it cannot be intended of a promise by J. S., for he had not promifed before. Judgment affirmed. Vide Sid. 292, 306. Lutw. 125. 3 Co. 703.

#### Prince versus Molt.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 248. S. C.]

N case the plaintist declared, quod cum quer. 3 Julii pos- Judgmentanestfessionat. fuisset de quodam clauso prati predict. desend. ed because more 3 Augusti erexit novum molendinum & aquam currentem secit vered than ought. inundare per quod inundarvit clausum suum predict. per quod Vide I Saund. totum usum & proficuum inde eodem secundo die Julii usque 154, 155. 1910 tempus exhibitionis bille predict. amist: Verdict pro quer., I Vent. 10. and entire damages; but judgment was arrested; for an Carth. 386. erection on the 3d day of August, might make him lose a S. C. called Prince versus particular gain or profit from the 2d day of July, as if he Moultin. 2 Mod. had laid in the meadow for hay. But by an erection on 154. Comb. the 3d day of August he could never lose totam usum & pro- 447, 443. S. C. Cases B. R. 13t. ficuum from the 2d day of July: therefore he has recovered Holt 192. more damages than he ought, and this case is not to be Vide Doug. 656. distinguished from Moor 887. Hob. 189.

6. East versus Essington. Mich. 1 Ann. B. R. [664] Vide this Case, title Bills of Exchange. Vol. 1. pag. 130. pl. 14.

### 7. Crowther versus Oldsield.

[Hill. 4 Ann. B. R., Vide this Case, title Jeofails. Vol. 1. pag. 364. pl. 5. 2 Ld. Raym. 1225. S. C.]

HERE a verdict will aid a title desectively set forth, but not defective in itself.

### Hadley versus Stiles.

[Mich. g Ann. B. R.]

DEBT on a bill penal for 300%. The defendant In debt on fingle pleaded nil debet, and the plaintiff took issue thereon, bill and ail deand the jury found nil debet for 2001, and debet as to 1001. Mr. Lutwyche urged, that this plea, iffue, and verdict were bet to part and immaterial, and that the debt could not be apportioned. debet to the rest, Et per Cur. The plea was ill, but the verdict has made it well after verdict. Vide good: We will intend 200 /. paid, and an acquittance un- 1 Mod. 292. der seal produced in proof thereof; and the jury may as 1 Show. 539. well apportion here as in debt on a simple contract, where 3 Lav. 55.

Saund 255 they may find nil debet for part. Vide Mo. 957. 1 Rol. 308. 2 William Rep. 257.

Vide 1 Show. 3. 2 Lev. 117.

#### diem.

## 1. Kempstet versus Deacon.

[Pasch. 8 Will. 3. C. B.]

A View is grantable, but that is only where the title is in question.

### 2. Anonymous.

[Trin. 10 Will. 3. B. R.]

Method of proceeding in case of a view. 2 53mad. 254. 6 Med. 221, 265. 1 Keb. 279, 418. 3 Keb. 103,254, §\$5.

I T was ordered, that when in order to a view, the last juror is withdrawn, the plaintiff shall take out a new diffringus, amoto the last man of the panel, to distrain the other twenty-three, with an apponas chiam decem tales. At the trial of this cause for want of a full jury upon the principal panel, some tales-men were sworn and had the view, but the diffringus was returnable as an original diffringus, and so many of the principal panel left out, who were not at the view; of which the defendant complained, and would have fet aside the trial for irregularity; but because no venire appeared to the Court, and the matter flood upon record as an original trial, and the want of a wenire was helped by verdicl; and because the cause was tried by those that were fittest, viz. those who had the view; the Court would do nothing in it, but ordered the other course for the future.

#### 3. Anonymous.

[Mich. 4 Ann. B. R.]

PER Helt, C. J. Before we make a rule for a view, the venire facias must be returned, and then we may make a rule, that so many of the panel shall view the premises (a).

(a) Vide ftat. 4 & 5 Ann. c. 16. feit. 8. 3 Geo. 3. c. 24. feit. 8. Bur. 253.

# Uilleins and Uillenage.

#### 1. Smith versus Brown and Cooper.

[2 Ld. Raym. 1274.]

THE plaintiff declared in an indebitatus affumpsit for Indebitatus af-20 % for a negro fold by the plaintiff to the defendant, grofold. viz. in parochia beate Marie de Arcubus in warda de Cheape, and verdict for the plaintiff; and, on motion in arrest of tances, or not? judgment, Holt, C. J. held, that as foon as a negro comes into England, he becomes free: One may be a villein in England, but not a flave. Et per Powell, J. In a villein the owner has a property, but it is an inheritance; in a ward he has a property, but it is a chattel real; the law took no notice of a negro. Holt, C. J. You should have a Vent 4. Antiaverred in the declaration, that the fale was in Virginia, and, by the laws of that country, negroes are falcable; for the laws of England do not extend to Virginia, being a conquered country their law is what the king pleases; and wecannot take notice of it but as fet forth; therefore he directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro fold here at London, but that the faid negro at the time of fale was in Virginia, and that negroes, by the laws and statutes of Virginia, are saleable as chattels. Then the attorney-general coming in, faid, they were inheritances, and transferrable by deed, and not without: And nothing was done.

Whether inheri-

#### Smith versus Gould.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1274. S. C.]

ROVER for feveral things, and among the rest de Trover lies not uno Æthiope vocat. a negro; and, on not guilty plead- in trespass quie ed, verdict was for the plaintiff, and feveral damages; captivum found and as to the negro 30%. And it was moved in arrest of cepit, plaintiff may give in evijudgment, that trover lay not for a negro, for that the dence that he owner had not an absolute property in him; he could not was his negro.

Notice the could an ox. Contra, It was said property implies the right of having and enjoying, and disposing; in things having but it does not always imply a power to destroy; that this a natural exist-

Vide 5 Mod. 186, 187. 2 lev. 201. 3 Lev. 336.

power holds in beafts, fowl, and fish, which were made

ence and a civil existence only. Vide anie 556, 637.

the property of mankind by the act of God, and have a natural existence, but not in things incorporeal, which confift in jure tantum; for this being a property ex instituto only, the owner has only a power according to the meafure of this instituted right: And it was instanced in the case of a common, a way, and a ward. On a ca. sa. the plaintiff has an interest in the body of the prisoner as a pledge not to fell, but to keep, and it goes to the executors. Hob. 61. In a servant to work him; in a captive to fell him. Reg. 102. F. N. Br. 88. a. B. N. C. 295. Bro. Property 38. 1 H. 6. c. 5. in Rast. 219. Cot. Abb. 460. That the writ de nativo babendo must lay the explees of à villein in working and taxing him at will. Co. Ent. 406. That by the law of Moses a man may be a slave, and a flave was a chattel, his master's money, Exod. 20, 21. That by the same reason there may be a servus pradialis, i. e. a villein. One may be a servus personalis, and that first a captive and afterwards a villein. Hob. 97. Brownl. 78. A villein in gross is a chattel, for he is of a perishable nature, and cannot endure for ever. So is Fitz. Discontinuance 16. Br. Villein 60. As villeins are regardant to land it is a different thing, and in that respect they are inheritances, and fo are the charters. Every villein is intended in law regardant; the writ in the register therefore supposes him to be nativum suum, but before he was a villein he was a captive, and then a chattel. Lastly, It was insisted, that the Court ought to take notice that they were merchandize, and cited 2 Cro. 262. The case of monkeys, 2 Lev. 201. 3 Keb. 785. 1 Inft. 112. If I imprison my negro, a babeas corpus will not lie to deliver him, for by magna charta he must be liber homo. 2 Inst. 45. Sed Curia contra, Men may be the owners, and therefore cannot be the subject of property. Villenage arose from captivity, and a man may have trespass quare captioum secum cepit, but cannot have trover de gallico suo. And the Court feemed to think that in trespais quare captivum suum cepit, the plaintiff might give in evidence that the party was his negro, and he bought him.

Servus prædialis and perfonalis. 3 Lev. 336. Hob. 283. Vide March 12. Raym. 16. Cro. Cas. 19, 391, 545. Cro. El. 126, 545. Cro. Jac. 262, 463.

## Milne.

1 Lev. 140. 2 Lev. 237. Cro. Car. 278. Raym. 67, 4170

#### Seaman versus Ling.

[Mich. 6 Will. 3. B. R.]

IF the defendant be a barrifter, he may have the vifne If the defendant changed to Middlesex. In Trin. 2 Ann., Wilcocks, an attorney, he may attorney, was fued by bill of privilege, and the action was change the venue laid in Suffolk; and upon motion the venue was changed to Middlesex. into Middlesex; and vide 2 Vent. 47. If an attorney being See 1 Mod. 64.
plaintiff lay his action in Middlesex, the venue shall not be 176. 1 Vent. changed; otherwise if in London (a).

1, 11, 16, 29,

person, has no right as such, when a defendant, to have the venue changed into Middlesex, Pope v. Redsearne, 4 Bur. 2027.; Yeardley v. Roe, 3 T. R. 573.; but when they are plaintiffs, the Tenue cannot be changed from Middle-

(a) It is now fully settled, that a fex upon affidavit of the cause of action barrister, attorney, or other privileged arising elsewhere, Spelman's case, 1 Wilf. 159. 1 Bl. 19. The privilege subsists though both the plaintiff and defendant are attornies relident within the county to which the venue is attempted to be changed, Pye v. Leigh, 2 Bl, 1065.

#### Anonymous.

[Pasch. 8 Will. 3. B. R.]

PER Holt, C. J. The motion to change a venue ought When motion to to be within eight days after the declaration delivered; change the venue but this rule is not always strictly adhered to. But, Trin. wide. Vide 7 W. 3. B. R., it was faid by Aston, one might move to Str. 211. 1 Will. change the venue at any time before judgment figned, 245. which Holt, C. J. denied, faying, heretofore it was never granted after the rules for pleading were out.

#### g. The Duke of Norfolk versus Alderton.

[Pasch. 9 Will. 3. B. R.]

A Motion was made to change a vifue in an action of Vifue refused to feandalum magnatum upon the common affidavit, in- action of scanfisting on my Lord Shaftsbury's case, 2 Jo. 192, 198., but dalum magnait was denied; for in my Lord Shaftsbury's case, it was on tum. Videt lev. an affidavit of the vast interest he had in the city, and the 39. 1 Lev. 307.

8kin. 40.

unlikeliness of an impartial trial; but we will not deprive 20. Carth.
400. Cafes B. R. the plaintiff of that benefit the law gives him, of laying his 121. 2 Jon. 192. action where he pleases, for the convenience of the defendant. Vide 1 Lev. 56.

> Note; At common law, all actions were laid in the prox per county, that there might be a jury de vicineto.

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#### Anonymous.

[Mich. 10 Will. 3. B. R.]

necessary to support the action arifes in two counties, the plaintiff may lay it in either. Vide infra. 7 Co. 2, 3, & 7, b. Raym. 33. 3 Lev. 178, 207. 194-

N an action on the case against the drawer of a bill of exchange who lived at Briftol, and drew the bill there. a motion was made to change the venue, but it was denied, for the person upon whom the bill was drawn lived in London, and there was the refusal, and that must be proved to make the first drawer liable; for where evidence necessary to support the action arises in two counties, the plaintiff may chuse which he will; and this is the ground of the rule, that if the plaintiff will be bound to give some material evidence in the county where the action is laid, the Court will never change the venue. Et Pasch. 10 W. 3. B. R. in trover and conversion the defendant had leave to change the venue, and the plaintiff moved to fet that afide, offering to be bound to give evidence in the county where the action was laid. Upon inquiry the Court found the plaintiff was affignee of commissioners of bankrupts, and could prove the assignment in that county. Per Holt, C. J. The whole is transitory. Et per Cur. The conversion is the cause of action, and not the assignment; and you are in place of the commissioners, and the venue was according to the rule. And, Pasch. 12 W. 3. B. R., it was held, that where a rule is made to change a venue, and afterwards the plaintiff would bring it back again, the rule must be, dare aliquam evidentiam de materia in exitu, in the county where the action was brought (a).

(a) When the venue has been changed upon the common affidavit from Eumberland to London, it cannot be brought back upon an affidavit that the cause of action was a promise to indemnify against becoming bail in Scotland, that the plaintiff's witnesses relide in Scetland, and are willing to come to Carlifle, but not further, and that there is no process to compel their appearance, Fogoe v. Gale, 1 Wilf. 102.; nor on an affidavit that the cause of action arose where the venue is laid; there must be an undertaking to give material evidence there, French v. Copinger, H. Bl. 216 .: Upon fuch an undertaking the plaintiff most be nonfuited, unleis he gives material evidence accordingly, Santler v. Heard, 2 Bl. 1031.; but the undertaking is complied with by proving a subsequent rule to pay money into court in the county where the venue is, Watkins v. Towers, 2 T. R. 275., or by proving a cause of action in a foreign country, Gerard v. De Rebeck, H. Bl. 289.

After

from M. to L., and the cause has gone down to trial at L., and been made a v. Hopkins, Cows. 400.

- After the weave has been changed remaner, it may be rechanged to L. upon the usual undertaking, Brucksbage

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#### Dominus Rex versus The Mayor of 5. Oxford (a).

[Pafch. 13 W. 3. B. R.]

N case for a false return, the action was laid in Suffolk, Vide service and the defendant moved it might be laid in Middle Service Raym. 33. and the defendant moved it might be laid in Middlefex; Kaym. 33. and gave as one reason, that it would raise heats in the 5 Co. 2, 3, 40 county. The Court inclined to do it, but the plaintiff in- & 7, b. fifted and would not confent, and therefore nothing was done, because he had a right to lay it in either county (b).

(a) Qu. Orford. (b) In Mylock v. Saladine, 1 Rl. 480., 3 Bur. 1564., after a trial in the city of Chefter for falle imprisonment there, and a new trial granted, the Court changed the venue to the county of Cheffer, on account of its appearing that an impartial trial could not be had in the city. The usual rule, when an impartial trial cannot be had where the venue is laid, and the cause of action arose, is to try the cause in the next county, case of The Magor, Sc. of Briftel, 1 Wilf. 77.; but the

Court will not permit a suggestion that an impartial trial could not be had, to be entered, unless there appears a clear and folid foundation for it, Res v. Harris, 3 Bur. 1330., 2 Bl. 378. If the next county is a county palatine, the venire is directed to the nearest county where the king's writ runs, Rex v. Cowle, 2 Bur. 861.; Rex v.

Amery, 1 T. R. 363.
Vide Mayor of Poole v. Bennett, Str. 874.; Mayor, &c. of Briftol v. Prodor,

1 Wilf. 298.

#### 6. Crocket's Case.

[Trin. 3 Ann. B. R.]

HE plaintiff declared of a promise in Staffordsbire, S. C. 6 Mod. and the declaration was delivered in Easter-Term. 175. Chetham moved to change the venue. Et per Holt, C. J. (the motion being in Trinity-term, ) Unless it appears upon the face of the declaration, that the plaintiff was not entitled to a plea to enter, we expect an ashdavit when the declaration was delivered, that thereby the Court may be afcertained.

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# Sir Samuel Gerard's Case.

[Mich. 3 Ann. B. R.]

A N action of false imprisonment against the sheriffs of Vide 1 Baund.

London was laid in Middlesex, and upon the common 229. Rhym. 33.

Str. 874. affidavit a rule was made that the venue should be changed

to London; but then it was faid that the officer of the Counter was subject to the sheriffs, and so there could be no good trial, for which reason it was removed back to Middlesex (a).

(a) Where the venue has been changed upon the common affidavit, and it appears that an impartial trial cannot be had, as in a city on a byelaw of that city, or in a county upon an action for words spoken in the heat Petyt v. Berkeley, Cowp. 510.

of an election, the rule for changing it will be fet aside, and it cannot be changed to an adjacent county where the cause of action did not arise, Slaughter v. Bradock, 4 Bur. 2447.;

#### 8. Heathcoat's Case.

[Pasch. 4 Ann. B. R.]

**Fenne not** changed in action against a lighterman, &cc. for 2 Lev. 307. 2 Sid. 87.

N action against a lighterman for not delivering goods, was laid in London, where they were to be carried. It was moved to change the venue, because the damage and goods loft. Vide neglect was in Kent; sed non allocatur; for the neglect is transitory, and not material where it was, and the Courtwill never change a venue for a carrier, which is the same case; otherwise perhaps in deceit, or where there is an actual misfeafance. Sed per Holt, C. J. Mich. 10 W. 3. B. R. fuit dit, that, in an action of escape, it is not the course to change the venue (a).

(a) An affidavit to change the venue from L. to C. must state that the cause of action arose in C. and not in L., or elsewhere out of C., and is insufficient if it omits not in L., Allen v. Griffiths, 3 T. R. 495. Vide Waddington v. Thelwell, 4 Bur. 2452.; Herring v. Durant, 1 Wilf. 178.

The Courts will not change the veme in an action on a libel in a newspaper which is circulated and fold in different counties, Pinkney v. Collins, 1 T.R. 571.; or in a letter sent from one county to another, Clisseld v. Clisfold, id. 647.; secus when it is contained in a letter fent from one place to another in the same county, Freeman v. Norris, 3 T. R. 306.; or from the county into which the venue is attempted to be changed, to a place abroad, Meicalfe v. Markbam, 3 T. R. 652.

It is not in general changed in debt or an action on a specialty, or bill of exchange, or promissory note, Str. 878. Barnes 491. 1 11 ilf. 41.; but in an action on a bond the wenne was changed to the county where it was sworn that the plaintiff's and defendant's witnesses lived, Foster v. Taylor, 1 T. R. 781.; but, in Pole v. Horobin, n. ibid., the Court refused, in a similar action, to change it to where the defence arose, with an offer to admit the execution of the bond; or from G. to S. in an action for running down a ship, the defendant's witnesses living in S. and the plaintiff's in G., Flecke v. Godfrey, id. ibid. That the action arose on a wager laid in O. respecting an event in C. is not a sufficient cause against changing the venue from M. 2 third county to O., Sbirley v. Collis, 2 Bl. 940. Vide French v. Copinger, H. Bl. 216, n. to pl. 4. ante.

Whether a venue can be changed into Wales appears to be still undecided. There have been many rules for the purpole made absolute without opposition, vide Pritchard v. Pugh, Doug. 262.; but on account of the

necessary form of the assidavit, it cannot be changed into the next English county, though the cause may be tried in such county; wide Waddington v. Thelwell, 4 Bur. 2450.; Moore v. Fernbaugh, 1 Wilj. 138.

It cannot be changed into one of the

four northern counties before the spring assizes, diet, ibid. Vide acc. 3 Bl. Com. 294.

It may be changed into a county palatine, Godfrey v. Philpot, 2 Ld. Raym. 1418.; Markbam v. Norton, cited 1 Wilf. 222.

#### 9. Knight versus Farnaby & al.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1253. S. C.]

M. Knight, clerk of affize of the Norfolk circuit, Clerk of affize brought an action of affault and battery against Farmary lay his action in Middle-naby and others, for a battery committed in Kent, and the venture of the state of the stat laid the action in Middlesex. Upon the common affidavit nue shall not be the visine was changed, and, upon the motion of Mr. changed. I Lev. Knight, that rule was fet aside, and the visue brought back 64. I Saund. again (a). Et per Holt, C. J. In strictness of law, an ac-247. 6 Mod. 82. tion for a transferry matter, as battery is, may be laid any 1 Sid. 326. Mod. 223. where. If by law the place were material, the defendant s. c. Holi 732. might give in evidence, as he does in criminal profecu- Practice of tions, that the battery was done in another county: How-vilne in transever it is now allowed and become the course of the tory actions be-Court, to change the venue for the defendant upon the sanin K. James common ailidayit: a practice which, as he had heard by common ailidavit; a practice which, as he had heard by old practifers, came up first in King James the First's time; but that rule had never obtained in cases of privileged persons, as barristers,  $\mathcal{C}_c$ , who are to attend at Westminster; and therefore have the liberty of laying their actions in Middlesex: So it was held in the case of Mr. Thompson against Scroggs. The plaintiff is an officer, he is bound to attend the assizes at Norfolk, and to attend at Westminster to return the postea's. By the statute of West- Clerks of affine minster justiciarii habeant clericos suos irrotulantes; and in westen. Dyer, upon a question who should return the postea's in cale both the justices of assize died before the day in bank, it was held the clerk of affize should return them: Therefore he is clerk to the judge of affize, and a minister here above to attend upon trials ordered by superior courts, upon writs of nife prius issuing out of those courts. Et per Powell, J. The privilege extends to judges' clerks, as well as to serjeants at law, barrifters, and attornies, for they are bound to be in Middlesex to attend their masters, and so is the clerk of affize; that the clerk of affize was the clerk of the judge of affize; and fince the statute has allowed the judge of affize to have a clerk, they shall not be obliged to return the poslea's themselves, but the clerk of assize shall attend at Westminster to return them.

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(a) R. ac. Bur. 2027. Bl. 1065. Vide 1 Wilf. 159. Ser. 222. Vol. II.

# Univerlities and Schools, Sc.

Vide ante 4 co. S. C. Cases B.R. 165. Skin. 665.

#### Hinton versus Hern. ı.

[Mich. 8 Will. 3. B. R.]

Vice-Chancellor's Court can-14 H, 4. 20.

HINTON was libelled against in the Universitycourt of Oxford, reciting the flatute of E. 6. and not hold plea for Car. 2. And the custom of the university to have but four taverns, and that he fold wine without their licence, Gilb. C. B. 195. in contempt of the laws of the university and the said statutes; and because a penalty is inflicted by the said statutes, and they cannot hold plea for such penalty, a prohibition was granted.

# [ 672 ] S. C. ante 412.

#### Matthews versus Burdett.

[Hill. 1 Ann. B. R.]

venting the growth of

Argued whether I N a prohibition the plaintiff declared, that whereas by to the Ecclesiast the common law it was lawful to teach others, and tical Court in a instruct them in any honest art or science, and that fuit for teaching teaching est res mere laica, &c.; yet that he was sued in licence from the the Spiritual Court for teaching children in the elements ordinary before of grammar, without licence from the ordinary. On dethe act for pre- murrer it was infifted for the plaintiff,

1st, That the law favours means of livelihood; that schifm. Quare- grammar was equally useful to all literate professions, and S. C. Salk. 318. that a lawyer or physician could be no more without it than a divine. That all the colleges in the university were lay corporations; that though the members of the college might be all of them spiritual persons, yet the corporation was lay and temporal; because the institution Ld.Raym. 5. 1Bl. and end was temporal, viz. to advance learning, which Wms. 29. Str. thews that a schoolmaster is a lay employment, and was 20.66. Rep. B.R. formerly under the care of the civil magistrate. Stillingfleet's Orig. Brit. 210, 212, 213. That the common law takes no notice of it but as temporal. Vide 11 H. 4. 47. Popls. 170. Reg. 35. And that the only mention of it before the Reformation, is anno Domini 1408. Per Lynder wode 282. That schoolmasters permit not their scholars to dispute of religion, under penalty of being censured for herefy, to which every body was liable; which provision was to prevent the spreading of Wickliffe's doctrine, That no law or canon required a licence till the

Com. 471. 1 P. Temp. Hard. 326. 4 Vin. Abr. 320.

Council of Lateran, anno Domini 1215. Decret. 6. Tit. 5. rap. 1, 2, 3. and that is, that there shall be a schoolmaster in every cathedral, and that he shall be licensed by the bishop. That the feveral acts of parliament which require the schoolmaster's taking a licence from the bishop, shew it was not necessary before, nor was there any such usage or practice that can be made appear. Vide flat. 23 Eliz. c. 2. 1 Fac. 1. c. 4. 14 Car. 2. c. 4.

adly, That if this was a calling which a layman might follow by the common law, a canon cannot restrain him of the liberty the law gave him; the common law and custom of the realm cannot be altered or abrogated, but by act of parliament, and therefore a canon cannot do it, though ordained by the king's royal licence, or afterwards confirmed by his royal authority. Vide 12 Co. 72. 2 Infl. 97. 647, 653, 657. 2 Ro. Ab. 454. Mo. 782. Ratio est, because being a layman, he is not represented, and therefore his confent is not given, and a man cannot be under the obligation of a canon without his confent express or implied. In the primitive church the laity were present at When the empire became christian, no canon was ever attempted without the consent of the emperor; and his concurrence included the affent of the whole body of the people; because he had the sole legislative power in him: But this is not the case of our king; for he has not the whole legislative power in him; ergs, his confent to a canon in re ecclesiastica, makes it a law to bind the clergy, but not to bind the laity. Vide 20 H. 6. 13. Br. Ordinary 1. 2 Ro. Ab. 226. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 589. Palm. 379.

3dly, Where the common law or a statute gives a re- 3 Salk. 318. medy in foro seculari, whether the matter be temporal or spiritual, the conusance of that matter belongs to the king's temporal courts only, unless the jurisdiction of the Spiritual Court be faved by that statute which gives the penalty; for otherwise one might be twice punished for the same thing (a). Vide Lit. sect. 136, 137. Cro. Car. 229. 1 Mod. 21, 22. 1 Jon. 320. Where a crime which was Hob. 121. punishable in the Ecclesiastical Court, is made felony, their jurisdiction is gone. For nota; The nature of the crime is altered. So 2 Leon. 53. 4 Leon. 92. That in this case the act of parliament which gives a temporal penalty, does not fave the jurifdiction of the Spiritual Court; which was urged as an argument that the parliament did not look upon it as an ecclesiastical matter; for in all cases where acts of parliament have imposed sar-

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(a) It is not in Littleton, but in Sir doctrine is laid down, which is sup-Ed. Coke's Commentary, 96, b., that this ported, Fortese. 345. 2 Will. 79.

ther penaltics in ecclefiaftical offences, there is a faving added for the jurisdiction of the Ecclesiastical Court; so is 13 Eliz. cap. 5. of usury; 31 Eliz. c. 6. of simony; 4 Jac. 1. of drunkenness; 3 Car. 1. c. 1. of the ob-fervation of the Sabbath; 3 J. 1. c. 4. of recusancy. And they urged also that these parliaments had not added these savings, if they had been useless; but it was their opinion, that imposing a penalty made it a temporal offence, and that their jurifdiction would have been loft without fuch a faving. And lastly, this difference was taken, that where an act of parliament gives a remedy for a spiritual matter in the temporal courts, the spiritual jurisdiction is gone; but where an act gives a remedy in a temporal matter to be prosecuted in the Spiritual Court, yet the remedy at common law remains, as pro violenta injectione manuum in clericum. Note; In the statute de circumspecte agatis, the words are, commission fuit alias; which must be understood of a jurisdiction before granted to them.

On the other fide it was faid, that the canon of Lateran, before mentioned, was received in England as well as the other canon of the same council for parochial tithes, and that it appears by custom, that the bishop is to superintend the education of youth. Vide Lindw. 1. 5. tit. De Seff. 2. c. 7. f. 5. Magistris, and the several statutes, requiring that he shall have a licence from the ordinary: And it was faid, that the toleration act did not influence this case, for that did not exempt men in places of trust from qualifying themselves according to the rites of the church of England.

Vide 12 Ann.

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Vide 1 Cro. 64, 65. 5 Co. 119. 2 Lev. 1:4,213.

# Uoid and Uoidable.

#### Hall versus Biggs.

[Trin. 2 W. & M. B. R.]

Where an order of just cas is not seid but voidwhite.

N debt on a bond, with condition to stand to and perform the order of the justices, the defendant pleaded they made no order; the plaintiff replied and fet forth the order. The defendant demurred; pretending it was a void order, and that he was not bound to perform it, comparing it to the case of an award; but the Court did

not

not think them alike; for the order being a judicial act is not absolutely void, but voidable, and continues an order till avoided (a).

(a) Vide Rex v. Inhabitants of Stotfold, 4 T. R. 596.

# 2. Prigg versus Adams & al.

[Mich. 4 W. & M. B. R.]

IN trespass and false imprisonment, the defendant justified Judgment of a as an officer under a ca. fa. on a judgment in the superior Court is Court of Common Pleas upon a verdict for 5 s. for a cause Vide a Lev. 184 of action arising in *Briftol*. The plaintist replied, and & 243. 3 Lev. fet forth the private act of parliament for erecting the 23. 5. C. Carth. Court of Conscience in *Briftol*, wherein was a clause, 366, 407. Holt that if any person bring such action in any of the Courts 182. at Westminster, and it appeared upon trial to be under 40s. that no judgment shall be entered for the plaintiff; and if it be entered, that it shall be void. Upon demurrer the question was, Whether the judgment was so far void, that the party should take advantage of it in this collateral action? And the Court held that it was not; but that it a Sid. 125. was only voidable by plea or error; as where one is taken Raym. 71. on outlawry and hath no addition; (vide 7 H. 5. c. 5. 8 H. 6. c. 10. Bend. 14, 88, 122, 132. 1 Inft. 259. Dy. 214. 5 Co. 119.) and said it was not like the case of a judgment vacated. 2 Sid. 225.

#### Thompson versus Leach.

[Hill. 9 Will. 3. B. R.]

[ 675 ] S. C. ante 427, 576.

B OND of an infant (b) or non compos is void, because the Bond of an inlaw has appointed no act to be done to avoid them; compos, is void. and the only reason why the party cannot plead non est fac- Vide Samuel v. tum, is, because the cause of nullity is extrinsic, and does Evans. 2 T.Rep. not appear on the face of the deed (c).

(b) The deed of an infant, which Abbott v. Parsons, 3 Bur. 1794.; but takes effect by delivery, is not void, but that of a feme covert is: The comparison between an infant and a non compos is not just. See this subject very fully discussed in Zouch ex dem.

an infant's warrant of attorney is void, id. Saunderson v. Marr, H. Bl. 75.

(c) It may be given in evidence on non est factum, Str. 1104.

Vide ante cq. Lutw. 874. Vaugh 50.

### Uses and Trusts.

S. C. 4 Mod. \$53. 5 Mod. 243. Judgment affi med. Show. Par. Ca. 104.

Hufband and wife covenant to levy a fine of the wife's land to the use of the heirs of the body of the hulb and on the wife begotten, the limitati· n is void. Q. 5 Mod. 153. S. C. Carth. 262, 354. 3 Cro. is a stranger. 334. 1 And. 2dly, This 328. 4 Leon. 29: i Vent. 372. 4 Mod. 380. 1 Vent. 272. 2 Lev. 75. Holt 730. Skin.

121, 150, 237. Vide Buti. Co. Lit. 216. n. 2. [676]

Davies versus Speed.

[Hill. 3 W. & M. B. R. Rot. 261.]

HUSBAND feifed in right of his wife: Husband and wife covenant to levy a fine to the use of the heirs of the body of the husband on the wife begotten, remainder to the right heirs of the husband. They have iffue, the wife dies, the issue dies, and the husband dies; and now the question in ejectment was, Whether the heir of the husband. or the heir of the wife, should have the lands? Et per Cur.

1st, Here can be no estate for life to the husband by implication; because the estate was the wife's, to which he

2dly, This limitation to the heirs of the body of the husband, &c. was merely void; for taking it as a remainder, there is no precedent estate of freehold to support it; and taking it as a springing use, then it is a springing executory use, to arise after a dying without issue, which the 351. Cafes B.R. law will not expect; fo that it is either way void, and yet 33. I Mod 58, must be one of them (a): But in this cafe the Chief Jufmuit be one of them (a): But in this case the Chief Justice held, that a feofiment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the whole estate remained to the feoffor in the mean time; so it is if it were to commence after the death of A. without iffue, if he die without iffue within twenty years.

(a) Supposing an estate for life in the wife by implication or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife, yet as she, as well as their issue, died in the husband's life-time, before the limitation to bis right heirs could veit, that must have failed as a contingent remainder, for want of a sublishing freehold estate at his death to support it. Fearne 409. (210.) With respect to the point, that the estate could not result to the husband, wide ac. Sir T. Tipping's-case, cited 1

P. Wms. 359. Jenk. Cent. 248. c. 18. Fearne 68. Saunders on Uses, 178. From the nature as well as the context of this case, and the report in Shower, it evidently appears that the question did not relate to the limitation to the heirs of the body, &c. but on the fubfequent limitation, which (vide Sbo. & Fearne) was not to the husband in fee, but to the right heirs of the hufband. The limitation to the heirs of the body was not after a dying without

### 2. Ld. Anglesey versus Ld. Altham.

[Pasch. 8 Will. 3. B. R. Gilb. Rep. 16. S. C.]

PON the trial of this cause at nisi prius in Middlesex, Fine levied and before Holt, C. J. 2 case was made for the opinion common reco-of the Court, viz. H. levied a fine, and afterwards suf-wherein conusee fered a common recovery, wherein the conusee was tenant, was tenant, and and there being no deed in the case, it was objected, that no uses of the fine declared. the use of the fine resulted to the conusor; and though intended to be the intent of the fine might be to make a tenant to the to the use of the precipe, yet no use or trust can be averred since 29 Car. 2. conuse, in order to make a tenant c. 3. Sed non allocatur; for at common law the use was of the freehold. always intended to be to the feoffee or conusee, and in Vide infra, & pleading never was averred. Co. Ent. 114, 273. Plowd. 477. prox. pag. Lutw. But if it be to the use of the feosffor or conusor, then it 361. S.C. Rep. must be averred (a).

ust be averred (a).

Eq. 16. Rep.

2dly, The Court held the party was in by the fine im
1 Vern. 367. mediately, and so there was a good tenant to the pra- Holt 733, 736. cipe (b).

3dly, The statute extends not to uses by operation of <sup>2</sup>Cruise <sup>28</sup><sub>Doug. 24</sub>. law, but to such uses as are to a third person, and that neither the conusor nor the conusee could aver the fine to the use of a third person since the statute.

(a) Per Ld. Mansfield, Roe v. Poppresumptions, to be encountered by bam, Doug. 24.: The presumption is, contrary evidence. Vide Saunders on Ufes, 137. that the fine is levied to the use of the conusor, which is liable, like all other (b) R. acc. 1 Str. 17.

### Tregame versus Fletcher.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.]

ERROR of a judgment in the grand sessions of Wales, Where the uses in replevin, where the defendant made constance of a recovery and in replevin, where the defendant made conusance, of a recovery are declared by a that A. was seised in see-tail, and suffered a common re- deed subsequent, covery; and that by deed made at a time subsequent, it the pleading was agreed the recovery should be to the use of B. for the should be general, that the refecurity of a rent-charge, and that rent was arrear, for covery was to which he distrained. Judgment was for the avowant. such uses. Vide Holt, C. J. held, 1st, That it was not well to plead the uses where uses may were declared by a subsequent deed; but he should plead, be averted by quad recuperatio habita fuit, &c. que quidem recuperatio in parel, and where forma predict. habita fuit to fuch and fuch uses.

2dly, He held, that where the uses of a recovery are 77. Lut. 273. declared by deed precedent, no new or other use can be 1 3id. 160. averred by parol, unless there was some variance between 1 Let. 223.

1 Salk. 75. a Co.

### **±676**

2 Vent. 242. 5. C. 3 5 alk. 302. Comb. 40 9 Co. 10. Quere, If the conuzor or lie'r at law cin aver it to other ules? Cases in Parl. 195, 145. Comb. 430.

the deed and the recovery; and that in case of a deed precedent, if the party fet up other uses, he must confess and avoid: But where they are by deed subsequent, new or other uses may be averred without shewing the deed, though there be no variance, &c., because there was an intermediate time when there might be fuch agreement made, and the uses arise by the recovery according to that agreement; and if a deed subsequent be set up, the other may traverse those uses. Adjournatur.

## [677]

### Jones versus Morley.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 287. S. C. Comyns 29.

Where a conveyance to uses policilian, the ules may be declared or revoked with: ut decd. I Co. Reller of Chedington. S. C. Carth. 410. 4 Mod. 261. 2 Lev 149. 2 Kcb 365. Raym. 239. 1 Vant. 278, 363. 2 Rol. Atr. 749. 2 Rep. 71. b. 1 And. 1 And 240. Moor 789. Care B.R. 159. Russer, 5 Co. 25. IA.k. 2. Saunderson Uses 213.

Carth 412. Comb. 430.

TIPON a special verdict in ejectment it was found. that Bowyer being seised in see, in consideration of tta ifinitati n of marriage, by indenture of lease and release conveyed to A. and B. to the use of herself in see, till the intended marriage with Edward Morley should take effect, and until the faid Morley should settle upon her a jointure of 300 %. Vide 2 Lev. 77. per annum, and then to the faid Morley and his heirs: The marriage took effect, and on the 29th day of January 1665, they covenanted and agreed to levy a fine next Hilary term; and the use thereof was declared by the same deed to be to E. Morley and his heirs. Afterwards, viz. the 31st day of the same month, by indenture between the hutband and wife, it was agreed and declared, that the uses of the deed of the 29th should be revoked this, the same Hilary term, a fine was levied; and this 126. Dier 309. writing of the 31st being no deed, it was resolved,

1st, That by the agreement of the 29th, the parties 2 Rol. Abr. 251. meant a fine to be levied Hilary term come twelve months, Bildy 1:2.5.C. and not the Hilary term then current, and therefore this

fine was not purfuant to that covenant.

adly, That if the fine had been levied pursuant to that covenant, no parol averment could have been allowed to declare other uses, or that the fine was not to the uses of that deed, and all parties had been estopped to aver the contrary by parol; but by deed subsequent, and before the

fine, other uses may be averred.

3dly, That fince the fine is not according to the deed, other uses may be averred, though they were declared by writing, and not by deed; for by the variance there is room and occasion given to inquire and receive information, that the old agreement was relinquished; and by the same reason the use of a sine may be declared by parol upon an original agreement, it may now, as in this case, where the original agreement was relinquished: Yet without such averment the fine shall be intended to the use of the first agreement, notwithstanding the variance.

4thly, That this is a good revocation of the uses of the Plowd. 3cr. first deed, though it be but a writing; for where the con- Gilb. on Uses veyance enures by way of transmutation, the use is ac-45. Carth. 4:2. cording to the intent of the party, and it is no matter how 15id. 26, 82. that intent is manifested, so as it may be known; but A use stall not where the conveyance is by way of covenant to stand tural affection feised, there must be a valuable consideration, or a binding without deed.

Mo. 688. agreement by deed (a).

(a) The judgment in this case was affirmed in the House of Lords, Show. Par. Ca. 140.

### 5. Shortridge versus Lamplugh.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 798. S. C.]

H. Brought covenant as affignee of a reversion, and If a lease and reshewed, that the lessor, in consideration of 5% lease be pleaded bargained and fold to him for a year, and afterwards re- to A. and his leased to him and his heirs, virtute quarundam indentur. heirs, and no confideration ap-burgainae venditionis & relaxationis necnon vigore statuti de pears, nor said to usibus, &c. he was seised in see. And it was objected, whose use it shall be in-that the use must be intended to be to the relessor and his tended to be to heirs, because no consideration of the release nor express the use of the use appeared by the pleading; so that without consider- release and his ing the operation of the conveyance, the question was heirs. Dyer 1,6. upon the pleading, Whether the use shall be intended to the relessor, unless it be averred to be to the relessee? Et per Holt, C. J. to which the rest agreed.

This way of pleading was certainly good before the statute 27 H. 8. so is Plowd. 478. and many precedents in Co. Ent. of feoffments averred in the fame manner; Yor the use was a matter that was extrinsical to the deed, and depended upon collateral agreements at common law, and then the use might, as fince the statute of frauds by suriting, be averted by parol, and therefore in pleading the conveyance was taken to the use of him to whom the conveyance was made, till the contrary appeared; if it were otherwise, it ought to come on the other side; and 27 H. 7 has not altered the course of pleading, which is rather confirmed by the statute; because, if now the use Vide Hob. 20. be construed to be to the relessor or feoffor, the convey
2 Wilf. 19.

Saunderson Uses
ance will be to no manner of purpose, it being still the
128-138. old effate to which the old warranty and other qualities 2 Atk. 148. remain annexed; whereas before the statute there might Co. Lit. 271. be some end in making the seossment, viz. to put the freehold out of him and prevent wardship; and Co. Lit.

[ 678 ] S. C. Farefl. 71. 3 Salk. 386. Holt 621. Vide post. pl. 7.

#### Ules and Truits.

Q. Whether there can be a seluiting ule upby leafe and releafe? Vide 1 Lev. 30. 2 Lev. 77.

goes no farther, than where is a feoffment to particular uses and estates, the residue of the use shall be to the feoffor, which is reasonable; for the raising those particular estates appears a sufficient reason for the conveyance. And Powel, J. doubted, whether there could be a refulting use on a lease and release, unless where particular on a conveyance uses are limited; for this way of conveyance is grounded on the ancient way of releating at common law, wherein there was a merger of estate, which is a good consideration, as where the leffor confirms to the leffee and his heirs. In error of a judgment of C. B. which was affirmed.

#### [ 679 ] Vide 1 Chan. R. 176. Lutw. 823.

Devise to trustees and their heirs. on truft to permit A. to take the profits for his life, and afterwards to stand seifed to the use of the heirs of A.'s body, is a use in A. and he has a tail. S. C. Eq. Ab. 383. p. 3. 1 Lutw. 814. Holt 703. 2 Vent. 311, 312. Whatever was or would have been a trust at common law, is fince the statute of ules exe. cut-d. 1 Vent. 232.

### 6. Broughton versus Langley.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 873. S. C.]

ONE seised of lands in see, devised them to trustees and their heirs, to the uses, intents, and purposes herem-after mentioned, viz. to the intent and purpose to permit A. to receive the rents and profits for his life, and after that the trustees should stand seised of the premises to the use of the heirs of the body of A. with a proviso, that A. with the consent of his trustees, might make a jointure for his wife; and the question was, Whether A. had an estate-tail executed, or not? And it was adjudged he had (a). Holt, C. J. pronounced the judgment of the Court, and gave these reasons: 1st, That this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word trust as well as use; and the case in 2 Vent. 312. Burchet and Durdant, is not law; and that the change of expression in the principal case by using the word permit in the first clause, which are words of trust, and afterwards making mention of a use, is immaterial, in regard trusts at common law and uses are equally executed by the statute.

adly, It was held, That a power to make a jointure, does not necessarily exclude an estate in tail, or an intent to give it; because tenant in tail, without discontinuing or barring the tail, cannot make a jointure; and so this power has its use.

(a) Where an estate is devised to one for the benefit of another, the Courts execute the use in the first or second devisee, as appears best to suit with the intention of the testator, Bull. \*. Co. Lit. 271. b. under 278. a. The use vests in the trustees on a limitation to pay over the rents and profits, Symon v. Turner, Eq. Ab. 382.; Buft v.

Allen, 5 Mod. 63.; Nevil v. Saunders, id., and 1 Vern. 415.; Jones v. Lord Say and Seal, Eq. Ab. 382. 8 Vin. 262. 3 Bro. P. C. 458.; Shapland v. Smith, 1 Bro. Ch. 75. Silvefter ex dem. Law v. Wilfer, 2 T. R. 44. 2 Bl. Com. 336.; Saunders on Uses, 231.; Vide Bagshaw v. Spencer, 1 Vez. 142.

S. C. 1 Salk. 40. & ante 601. 2 Ld. Raym.

#### lifes and Cruffs.

# Adams versus Tertenants of Savage.

[Hill. 1 Ann. B. R.]

854.

heirs male of A.'s

[ 680 ]

IN a scire facias on a judgment against tertenants, it Lease and release was found by special verdict, that one Savage being and their heirs to feised in see, conveyed by lease and release to trustees and the use of A. far their heirs, to the use of himself for 99 years, remainder 99 years, reto the use of the trustees for twenty-five years, remainder use of the trustees to the use of the trustees for twenty-five years, remainder use of the trustees to the use of the use of the trustees to the use of the trustees to the use of to the heirs male of his own body, remainder to his own tees for 25 years, right heirs; the question was, Whether Savage was te- remainder to the nant in tail, or only tenant for years? And the Court held body: remainder the limitation to the heirs male of the body to be void, whis right heirs, because there was no preceding estate of freehold limited is void, for want to support it; and it shall not be implied contrary to the Chan. Rep. intent of the conveyance; and if it could be implied, it 239. 6 Mod. must be out of the estate given to the heirs of the body, 134, 199, 226. which cannot be, because this is a new use; whereas a Holt 179. Lilly refulting use is always from the old estate, and parcel of Ent. 398. Mod. the old use; and here the estate takes effect by transmu- Cas. 114, 199, tation of possession out of the seisin of the trustees; and not like Fenwick and Milford's case (a), where the owner covenanted to stand seised to the heirs of his body. And yet per Powel, J. Even in that case, if there had been an express estate limited to the covenantor, it had been otherwise (b).

(a) The case alluded to is Pibus v. Mitford, 1 Vent. 372.

(b) Vide Pibus v. Mitford, 1 Vent. 372.; Penbay v. Harrell, 2 Vern. 370; Rawley v. Holland, 5 Vin. 189. 2 Eq. Ab. 753.; Tippin v. Cofin, Carth. 272. Mod. 380.; Ferwick v. Mitford, Moor 284.; Else v. Osborne, 1 P. W. 387.; Soutboott v. Stowell, 1 Med. 226. 2 Mod. 207.; Wills v. Palmer, 5 Bur. 2515. 2 Bl. 687.: The general conclusion from which, is thus flated by Mr. Fearne: "The inference afforded by the feveral cases seems to be, that when the use is not limited away during the whole life of the grantor, and there is an use limited which cannot commence till after his decease, (as is the case of a limitation to the heirs of his body taken by itself,) whether that use be limited in the first instance, (as in Pibus v. Mitford,) or be preceded by limitations for terms of years, (as in Penbay v. Harrell,) or by uses of the freehold or inheritance that may determine in the grantor's life, (as in Wills v. Palmer,) the use results to the grantor for life, immediately in the first case, and in remainder expectant on the preceding uses in the other, where there is no express use limited to the grantor himself, inconsistent with such an implication. Vide Butl. 2 Co. Lit. 216. a.

#### 8. Pye versus George.

[Mich, 9 Ann. In Canc. S. C. 1 Wms. 128. Prec. in Ch. 308. 1 Eq. Ca. Ab. 384.]

Truffees join to TRUSTEES appointed to preserve contingent remainders did join in a conveyance to destroy the reremainder, it is a breach of truff. mainder before a fon was born; and this was decreed a Cro. Car. 312. plain breach of trust; and that whoever claimed under 1 Chan Rep. 28, this conveyance, having notice of the trust, or by a voluntary settlement, should be liable to make good the estates. Per Harcourt, Lord Keeper (a).

(a) Vide the statement of this case, 1.Bro. P. C. 366. the decree was affirmed in the House of Lords.

It was ruled in Mansell v. Mansell, 2 P. Wms. 678. Temp. Talb. 252., that the devisee of tenant for life, to whom the truftees for supporting contingent remainders had conveyed the estate, should reconvey to the uses of the settlement.

In the case of Platt v. Sprigg, 2 Vern. 303., the truffees were directed to join in a sale to pay off a mortgage prior to the settlement: So in Baffet v. Chapman, 1 P. W. 358., in a conveyance for the benefit of the creditors of a person who had made a voluntary fettlement: So where lands have been limited to the father for 99 years, &c., remainder to trustees, &c., remainder to the first and other sons in tail, remainders over, the Courts of Equity will direct the trustees to join in a setthement on the marriage of the eldest son, to preserve the estate in the family, and answer the uses originally intended, Frewin v. Charleton, 1 Eq. Ab. 286. ; Winnington v. Foley, 1 P. Wms. 536.; but will never interpose for the purpose of enabling any of the parties to fell the estate, and disturb the original intention of the fettler or devisor, Davies v. Weld, 1 Vern. 181. 1 Eq. Ab. 386.; Townsend v. Lawton, 2 P. Wnis. 379.; Symance v. Tattam, 1

Atk. 613.; Woodbouse v. Hoskins, Atk. 22.; Barnard v. Lenge, Cox's note 2 P. Wms. 684. 1 Bro. Cb. 534. Ambler 774. Vide Sir Tho. Tippen's case, cited 1 P. Wms. 359.; Tipping v. Pigott, 1 Eq. Ab. 365. S. C., in which the Court refused to aid the heirs of A. against a subsequent settlement made by A. and the truffees, under a settlement in trust for A. for years, remainder to preserve, &c., remainder to the first and other sons, remainder to the heirs of A. Vide also Else v. Osborne, 1 P. Wms. 387.

Mr. Fearne says, "It seems to be the safest way for trustees not to act, except in the clearest cases, without the direction of the Court. I should rather recommend to their attention the words of the Lord Chancellor in Pye v. George, (cited 2 P. Wms. 684.) That it would be a dangerous experiment for trustees in any case to " destroy remainders which they were " appointed by the fettlement to pre-" ferve;" as well as the observation of Reynolds, C. B., in Manfel v. Mansel, " That whatever the Court have " done, or may do, under particular " circumstances, yet they will never " have it left to the discretion of a " trustee to do it, Temp. Talb. 259." F. C. R. 493. Vide Garth v. Cotton. 1 Ve≈. 524, 546.

# Ulury and Extortion.

Cro. Jac. 104. 509. Cro. Car. 283,253. 1 Lea 54. 1 Hawk. cap. 68 & 82.

### 1. Domina Regina versus Smith.

[Pach. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 3 Ld. Raym. Entries 47.]

INDICTMENT was at the fessions before the just-tices of the peace at *Hicks's Hall*, for usury, contral have not justification formam flatuti, and judgment was against the defendant, diction upon the upon which a writ of error was brought in B. R. and the flatute of usurg. judgment reversed; for the justices of the peace have no jurisdiction in this case (a).

(a) But for extortion they have, jury or forgery at common law; but for 2 Hawk. 40. They have not for per-perjury upon the stat. 5 Eliz. they have.

#### Domina Regina versus Baynes.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1199, 1265. S. C.]

TIPON a certiorari this order was removed, Whereas Charge of extorby complaint in writing at this fessions, exhibited to tion ought to be this Court against R. B. clerk of the peace, R. B. was laid the defendcharged with divers mildemeanors in his office, viz. that ant took it exhe exacted of one A. the fum of 5 s. for a fubpena, and torfive. S. C. did compel one B. to pay him 9 s. more than his due fee; 6 Mod. 192. and it doth appear upon evidence, that the faid R. B. Holt 512, 514. mildemeaned himself in his office by extorting of the said A. by colour thereof 5 s. more than was due, and of the faid B. 9s. more than was due; this Court doth discharge and remove him from the faid office of clerk of the peace.

Note; By I W. & M. Seff. 1. cap. 21. fest. 4. If any clerk of the peace do misdemean himself in his office, and thereupon a complaint and charge in writing of fuch mifdemeanors be exhibited against him to the sessions, the fessions shall discharge him. It was agreed by all, that if here was not a charge of extortion against R. B. then he was not removed; for the justices have only a special authority to execute as the statute appoints, and the act shall be construed strictly, because it deprives the defendant of the benefit he has by Magna Charta, of being tried per pares. The justices of the Queen's Bench being divided, it was adjourned into the Exchequer-Chamber, where Gould and Powys, Justices, Smith, Baron, Ward, C. B. and Trever, Ch. Just. of the Common Pleas, held this a good charge

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of extortion, by reason of the viz. which particularizes the general charge, and incorporates what follows after it with what went before it. Cited 2 Brownl. 151. 1 Vent. 37. West's Preced. 97, 130. 1 Sid. 91. 1 Keb. 357. Holt, C. J. Powell, and five more justices, contra. Before the viz. all was mere recital and also general, and no general charge is by law allowable in any case but barretry, which in its nature must consist of a heap and multitude of particulars; but that in this case it ought to be certain and politive; because he is charged with a mildemeanor, and ought to know what he is to answer to; he is not only to be fined, but to lose his freehold; and where a man is to lose any part of his property, he must have a certain charge against him; the act requires the cause of removal should be in writing, that the cause may appear, and that he may have the benefit of appeal; and these articles are in the nature of informations; that what went before the videlicet being only matter of recital, and a kind of title to the articles, the charge begins at the videlicet, and then it does not appear that these misdemeanors relate to his office. It is not faid that he took those sums extersive & colore officii, and a man cannot be charged for extortion without charging him with acting exterfive, which are words as ne-ceffary as proditorie & felonice. In this case non constat but 8 s. was his fee. The charge should have been, either that 3 s. was his fee; and that he colore officii sui extersive took 8 s., or generally, that he colore officii sui injuriose & extorsive. took 8 s. pro feedo, &c.

In convictions what appears upon evidence will not supply the defects of the charge.

Lastly, They held, that what followed upon evidence before the justices, does not help, because it is no part of the charge: And the order quashed. Note; This report is only of the effect of what was faid in B. R.

Note; The stat. of usury is not pleadable to a bottomry-bill or band, &c. 1 Lev. 54. 2 Lev. 7. 1 Show. 8.

[682] 1 Leon. Caf. 340. 2 Leon. Caf. 143. Cro. El. 700. 3 Leon. Cal. 55. 2 laft. 45.

# Mager of Law.

### 1, Anonymous.

[Trin. 11 Will. 3. B. R.]

Method of per. forming wager

ACTION of debt was brought on a by-law; the defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon the last day of the term he came: And Northey for the plaintiff infifted, that if he swear falsely or rashly, and without reason, the Court is not bound to receive him to it, and prayed a day to speak to that point. Sed per Holt, C. J. We can admonish him; but if he will stand by his law, we cannot hinder it, feeing it is a method the law allows; and the defendant was fet at the right corner of the bar, without the bar, and the secondary asked him, If he was ready to wage his law? He answered, Yes; then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose, Whether the plaintiff was demandable? and a divertity taken where he perfects his law inflanter, and where a day is given in the Bro. Nonfuit 16 same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the Court admonished him and also his compurgators, which they regarded not so much as to defift from it; accordingly the defendant was fworn, that he owed not the money modo & forma, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book, and fwore, that they believed what the defendant swore was true. Per Northey, This will be a reafon for extending indebitatus assumpsits further than before. Holt, C. J. We will carry them no farther.

Note; This feems to be the case mentioned pl. 2. to have happened in B. R. about two years before, and not to be

law.

## 2. Mood versus The Mayor of London.

[2 Martii 1701. At Guildhall Chamber.]

N debt for the penalty of a by-law the defendant waged was of law his law, and it was over-ruled in the court of the Lord lies not in debt. Mayor, and a commission of error sued out before Holt, on a by-law-ner C. J., Ward, Chief Baron, and other commissioners. Et any action where a wrong is supper Holt, C. J. Debt on a by-law made by a corporation, posed. 1 Show. is founded on the wrong of the party in not submitting to 75. 3 Keb. 337 the order of the government of the corporation, and it 2 Lev. 142, 174. arises from his contempt and disobedience, and in such 1 Lev. 151. cases no wager ought to be allowed: So it is in debt for 2 Roll. Abr. 106. an escape, for it supposes a wrong, and the action lies not against the executors: So it is in debt for substraction of tithes: So it is in debt against an executor on a devastarit, because it supposes a wrong, and therefore the same action lies not against the executor of the executor.

[ 683 ] S. C. I Salk. 397. Holt 740, 369. Vide

Wager of law

By

By common law, if a contract was secret and wanted witnesses, it was a privilege on the plaintiff's side as well as the defendant's; for if the contract was fecret, the plaintiff had the privilege of putting the defendant to his oath. This appears from Magna Charta. Nullus ballivus ponet aliquem ad legem manifestam, nec ad sacramentum simplici loquela sua sine testibus fidelibus. Before this, the plaintiff, on his declaration upon bare affirmance, might make the defendant swear there was nothing due. At this day, if the plaintiff produce witnesses to prove his demand, the Court may put the defendant to wage his law; and in such case the defendant is not at liberty to cross-examine, no more than where the plaintiff in a prohibition produces witnesses to prove his suggestion.

Wager lies in account if he recewel of the flianger. And in detinue, whether his receipt

No wager lies but where the debt arises from a simple contract that is fecret, and not where the action is founded plaintiff, not of a on any thing that is notorious. In account, if the receipt was by the defendant, the defendant may wage, not if by the hands of a third person. It is true, the law is otherwas of the plain- wife in definue on a bailment; for though the bailment till or altranger. was by the hands of a third person, the defendant may wage his law; but here the bailment is not traversable, but the detainer, and that is the point of the action, and the redelivery might be private.

In debt für arbitrament.

In debt on an arbitrament, (I intend where the fubmission is by parel,) the defendant may wage his law; because, though the arbitrators, who are strangers, are concerned, yet the submission might be secret; and that is the foundation from whence the debt arises.

In debt for an emerciament in a court-baron. But not on a judgment in a court-baron. 2 Mud. 140. 2 Vent. 171. 1 684 1

In debt for an amerciament in a court-baron, the defendant may wage his law; the reason is, because the matter is of small value which concerns the lord only; transacted in pair, \* which might be without his knowledge: But in debt on a judgment in a court-baron, the defendant cannot wage his law; for the judgment could not be but by confession or verdict, and it was in a proper court; all which the defendant cannot by his bare oath falfify; and the authorities to the contrary are not law; and so it is in debt on a judgment in a court of ancient demesue. Br. Leggager 11, 34.

In debt for rent on a lease parol, the defendant cannot wage his law; because his occupation is notorious, which is a better reason than because it sayours of the realty; and so it is in account against a bailiff for the same reason, his management and transaction being notorious.

L'es not in debt fer rent, and the traion.

> In debt brought by a gaoler against his prisoner for meat and drink, the defendant cannot wage, not because the gaoler is obliged to find him victuals; that is not true, as appears by Plowd. 63. a., but because the defendant is in

Not in debt by a garles for meat a.d drink.

durance, and the plaintiff cannot take security from him for repayment; for a bond will be void, so that he must be content with a promise: And he did not deny the case of 9 Co. 87. b. 88. a., which was debt by a labourer; it is but just that the plaintiff should prove he was retained, rather than that the desendant should be put to wage his law.

In debt on a by-law made by a company, the defendant in a case cited to be in B. R. about two years before, waged his law; but Holt, C. J. said, it was because the counsel for the plaintiff did not challenge it; for he wondered at it then; but this is not so strong as debt on a by-law by a corporation; for this obliges all strangers without notice; but the other only their own members, till notice: And the Chief Justice denied the case in Co. Ent. 118., and the case 2 Ro. Ab. 106. pl. 9.

Note; A bailiff may not wage his law, but a receiver may. Cro. El. 790.

# Warranty.

[685] Vide 2 Inft. 276. 1Co.1. Cro. Car. 483. Cro. El. 72. Lutw. 853. Stat. 4 & 5 Ann.

### Smith versus Tyndal.

[Pasch. 4 Ann. B. R.]

Negetiment, a case was made for the opinion of the Court: Maximilian Taylor being seised in see made his will in the year 1674, and thereby gave several personal legacies; and, amongst others, sour coats to sour poor boys of the parish of J. S. for ever; and then he devised all his lands, tenements, and hereditaments whatsoever, and likewise all his goods, chattels, money, and personal estate, to Margaret his wise, and her assigns, and made her executrix, and lest 1000 l. personal estate. Margaret married Archibald Tyndal, and they two by indenture covenant to levy a fine to the use of them two for their lives, remainder to Archibald and his heirs with warranty, and accordingly a fine was levied.

1st, The Court held this devise to Margaret was a fee, because it was subject to a perpetual charge + (a).

Gould went upon this resson. Holt and Powell thought that charge might be applied out of the personal effate. 2 Mod. 25.

(a) Vide 1 Inft. 9. b. 8 Vin. 222. Lee day, id. 1618.; Goodright ex dem. v. Jones, 2 Sho. 49. 2 Jo. 107.; Bad-Fhipps v. Allen, 2 Bl. 1041.; Bible ex deley v. Leppingwell, 3 Bur. 1533.; dem. Mole v. Thomas, id. 1043.; Doe Frogmorten ex dem. Bramstone v. Holy-ex dem. Palmer v. Richards, 3 T. R. Vol. 11.

Wood's Inft. 2dly, That in case it was not, yet that the heir of Mar-228. 4 & 5 Ann. 220. 4 & 5 Ann. c. 16. alters this garet was bound by this collateral warranty. point; no collateral warranty shall be a bar.

Cestuiq; use may take advantage of a waranty annexed to the estare. 3 Rep. 62. 3 Co. 3 Co. 54. Lutw. 857. 1 Mod. 182, 923. 2 Mod. 14.

Plaintiff in riectment may make title by a collateral warranty. Vide ante, Page 421.

† Qu. Or the descent catt. 686 ] Rights of entry are bound by collateral war-Lanty. VideStat. not extinguishes a right.

3dly, That though a ceftuig; use is in the post, and not in the per, yet he may take advantage of a warranty annexed to his estate, according to Lincoln College's case; ratio est, because, by the statute of uses, the estate in law in possession is transferred to his use, and he is tenant of the legal estate, and has all advantages that the tenant had before to defend his effate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loss.

4thly, The Court held, that the plaintiff in ejectment may make title by a collateral warranty, and give it in evidence as his title, according to 10 Co. 97. So if a diffeifor dies after five years quiet possession, and the disseifee enter, the heir may maintain an ejectment, for the right of possession belongs to the heir, though the mere right be in the diffeifee: So if a man enters by wrong and diffeiles another, and continues twenty years in quiet possesfion, yet in these cases, if a writ of right were brought, and the mife joined upon the mere right, the verdict must be for the plaintiff, notwithstanding the statute of limitations in the one case + or the collateral warranty in the other.

5thly, That rights of entry are bound by collateral warranty as well as rights of action.

othly, That no warranty extinguishes a right, but only binds or bars it as long as the warranty continues in force; 4, 5 Ann. c. 16. for if the warranty be released, the ancient right revives. Warranty binds, Litt. § 708.

356.; Goodright ex dem. Baker v. Southoufe, id. 272.; Denn ex dem. Niocr Stocker, 5 T. R. 13; Andrew v. v. Miller, id 538.

Vide Cro. El. 694. 9 Co. 28. 1 Keb. 509.

Waifs, Eliraps (a). &c.

## Henly versus Walsh. [Mich. 4 Ann. B. R.]

Owner of a first T RESPASS for his horse: Defendant pleaded, that may leife it, tenone Pooly was owner of the horse, and that the horse - ring latistaction. S. C. 3D. estrayed out of his possession, and came to the hands of

(a) In the case of an estray, proclathe owner comes not within a year an i market a day after, and claim the cat:le, they says at mos of the next market towns, are a forfeit to the ford of the manor, thiswing the marks of the castle; and if ... Wood's last. 213.

the

### Weights and Weatures.

the plaintiff, and that he by command of Pooly demanded 292. D. p. 2, the horse within a year, &c., and tendered amends, and Rep. A. Q. 89. that the plaintiff refuling to deliver him, he took him. To Holt 563. this there was a frivolous replication, and upon that a demurrer. Et per Cur.,

1st, Without telling any marks, or making any proof of property (which may be done upon the trial) the owner may seise his horse where he finds him. Vide Co. Ent. 40, 170. b. Rast. 680. 7 H. 6. 2. 44 E. 3. 14. Br. Estray 1.

And, 2dly, Though the defendant does not plead directly that he tendered amends, but only that he demanded the horse proferendo satisfaction.; yet the Court held this a direct affirmation, like the case of warrantizando vendidet; where the participle affirms as directly as a verb; so dans plagam mortalem is well enough.

2 Cro. 630. 4 Co., Long's case.

3dly, The Court held, that though it was said he ten- And in pleading dered amends generally, and did not express any certain it, he need not flum, wet that was good in this offer and a different flow a certain fum, yet that was good in this case; and a difference was sum. Cro. El. taken between this case and that of a tender of amends for 813. a trespass. In that of a trespass, if the defendant pleads a tender of amends, he muit shew what he tendered; for he must tender a certain sum; and the law puts this diffi- 1 Show. 161, culty upon him, because he is the wrong-doer, and the 162. other is confessedly a party injured: But the owner of the stray is no wrong-doer, and it is impossible he should 1 Ro. 877. know how long his horse had been in the lord's custody, 2 Ro. 92. Huta nor how much will make a proper fatisfaction (a).

Another exception was, that the defendant does not a vent. 109. aver the amends tendered was refused. Et adjournatur. 18id. 13. Ante Vide Cro. El. 888, 889. 1 Ro. Ab. 879. 2 Ro. 92. 623.

1 Sid. 13.

(a) But sufficient amends must be tendered, for till then the lord may lawfully detain the estray.

## Weights and Measures.

Vide Stat. 8And. c. 18. Lamb. 356. Dait. 146, 165. Baker's Chron. 43.

Dominus Rex versus Flint.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 442. S. C.]

HE defendant was indicted for not making his bread In insistment of lawful weight, and demurred to the indictment; for making light and Mr. Buxton took exception, that it was only debitum enough to thew

is due weight, and what is Vi. 3 Bur. 1697. pleaded.

that it had not pondus minime babens, not shewing how much debitum pondueweight, with out the wing what dus was, and what was wanting; and this was agreed to be a fatal exception by Holt, C. J. And whereas it was faid the demurrer had confessed a deficiency, the Court held wanting. S. C. the demurrer had contened a denciency, the Court held wanting. S. C. Cases B. R. 242. the demurrer confessed nothing but what was well

**「 688** ] Vide ante 570. & tit. Revocation 592.

# Wills and Testaments.

#### Shires versus Glascock.

[Pasch. 3 Jac. 2. C. B.]

The attestation good within the fatute of frauds, if the teflator might fee the witnesses fign, if he pleafed. S. C. Eq. Ab. 403. p. 8. Carth. 81.

PON a feigned issue, the question was, Whether the will was made according to the statute of frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might fee them. Et per Cur. The statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the figning was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn (a).

(a) The same point was decided in Davy and Nicholas v. Smith, 3 Salk. 395.; and in Casson v. Dale, 1 Bro. Cb. 99., where the testatrix was in a carriage when the will was attested in an attorney's office, through the window of which the might fee what palled there.

But if it appears that the testator could not fee the witnesses attest, the will is void, though they retire for the purpose at his request, Eccleston v. Petty, al. Speke, Carth. 79. Comb. 156. 1 Sho. 89. Holt 222.3 Broderick v. Broderick, 1 P. Wms. 239.; Mac-

kell v. Temple, 2 Sho. 288. Vide Longford v. Eyre, 1 11 ms. 740. If the teftator, though present at the time of the attestation, is in a state of insensibility, it is insufficient, Right v. Price, Doug. 241.

When the attestation only expresses that the testator signed in the presence of the witnesses, not adding that they subscribed in his presence, and the witnesses are dead, it is a question for the jury whether they were present or not, Hands v. James, Comyns 531.; Croft v. Pawlett, 2 Str. 1109.

# Witnesses.

[Vide Title Evidence and Proof, p. 555.]

6. C. 5 Mod. 15. 3 Lev. 426, 427. Skin. 578. Holt 753. Cases B.R.

### Dominus Rex versus Crosby.

[Pasch. 7 Will. 2. B. R. 1 Ld. Raym. 39. S. C.]

ON a trial at bar for high treason, the prisoner, Mr. 3 Salk. 461. Crosby, took exception to Aaron Smith's evidence, 5 Mod. 74. 75. having stood in the pillory upon a judgment in an information against him for a libel. Mr. Solicitor and Mr. Cowper infifted, that the infamy flowed from the crime and not from the punishment, and that Mr. Smith's crime was not infamous, nor did it deserve such punishment. Holt, Whether the in-C. J. without determining this point, held, that Aaren famy arises from Smith was restored by the general pardon of 2 W. & M., the crime or which operated by way of restoration, and made him a pillory. Q. Vide new creature. 3 Lev. 427. Vide the case of Chester versus and 461, 514. Hawkins, that the disability flows from the infamous judg- post. pl. 3. Fa-ress. 101. Hob. ment, and not from the nature of the crime (a); for if a 59-Raym. 74man be convict for a cheat, and adjudged to stand in the pillory, he cannot be a witness; otherwise if he be not adjudged to stand in the pillory Also they held the infamy was by the judgment to stand in the pillory, and not from the actually standing there, and that he was disabled to be a witness, though he never stood. Nota; In these cases the disability is a consequence, and the pardon, which makes him de catero a new creature, discharges all consequences, dependencies, &c. And therefore, in the case of the King and Weeden Ford, Mich. 12 W. 3. B. R., the The king may question being, Where the king could pardon the disabi-pardon disability lity, and where not? Holt, C. J. took this difference; consequence of where the disability is only the consequence of the judge the judgment, ment, the king may pardon it; but where the disability is one of it; but part of the judgment itself, the king's pardon will not take in that case a flait away; therefore if a man be convict of perjury on the tute pardon will, statute, the king's pardon will not restore; for it is not a consequence, but part of the judgment, viz. quod imposse-

(a) It is now settled, that it is the infamy of the crime, and not the nature or mode of the judgment, that renders a witness incompetent; vide post. pl. 3. 5 Med. 13. 2 Wilf. 18, Gilb. Ev. for-

mer editions 139. last edition 257. If one attainted of treason is pardoned, it makes him a good witness, 5 Mod. 16. though before the pardon he would not [ 600 ]

rum non sit receptus ut testis. Vide Co. Ent. 368. pardon by act of parliament will restore him in that case. Quod nota. Quere of a perjury at common law; and if the law be the same; for there the disability is only a consequence, and not part of the judgment; otherwise if a jury be convict in an attaint. Raft. 86. a.

#### Pitman versus Maddox.

[Hill. 11 Will. 3. Coram Holt, C. J. At niss prius in Middlesex. 1 Ld. Raym. 732. S. C.]

7NDEBITATUS assumpsize on a tailor's bill; at the Shep-book allowed asseridence trial, coram & per Holt, C. J. a shop-book was allowed on proof of the for evidence, it being proved that the servant that writ the Gervant's band. who made the book was dead, and this was his hand, and he accustomed entries, he being dead. Vide ante to make the entries; and no proof was required of the delivery of the goods; and the Chief Justice said, it was as 281, 285, 555. & Farell. 9. good evidence as the proof of a witness's hand to an obli-6 Mod. 149. gation; and he held, that though the statute 7 Jac. 1. 7 Vent. 151. c. 12. says, A shop-book shall not be evidence after the 6 Mod. 248. 1 Salk. 285, year, &c.; that it is not of itself evidence within the 236, 287 ycar. Tarell. 189. S. C. Holt 298. Vide Bull. N. P. 283.

### Dominus Rex versus Ford.

[Mich. 12 Will. 3. B. R.]

Prisoner having escaped may be a witness to prove tary, upon traverse of an inquilition for the gaoler. Poft. pl. 5. Vide 4 Bur. 8251.

I PON a special commission issued out of Chancery, an inquifition was taken, which found, that Weedon theescape volun. Ford had committed five voluntary escapes. Ford traversed, and upon the trial, one who was fuffered to escape, but was returned again, was produced to be a witness: And effice against the it was objected, that this was to fave his own bond which he had given to be a true prisoner, and would entitle him to an action of falle imprisonment against the marshal, and compared it to the case of an usurious bond. Sed per Cur. The bond given by the prisoner is a collateral matter to the escape; and the consequence of his evidence as to that bond is not material to disable his being a witness; and it Is not like the case of usury; for that renders the bond void; and this is a matter privately transacted between the party and the officer, of which there can be no other evidence.

> adly, That this witness was convict of barretry, and the record produced; but the judgment was, to be fined 500 marks, and not to stand in the pillory. On the other side

it

it was argued, that a bare conviction of perjury would take The nature of away one's evidence, because it is an infamous crime; but the crime and conviction, not not fo of barretry, which was not of an infamous nature, of the punish without an infamous punishment, as the pillory. Curia ment, makes the contra. He is disabled by the conviction, for it is not the ante pl. 1. nature of the punishment, but the nature of the crime and 2 Wilson 18. conviction, that creates the infamy.

Then it was infifted, that he was pardoned by the late general pardon. Et per Holt, C. J. If one be convict of Perjury. Vide perjury upon the statute (a), he cannot be restored to his ance 513, credit by the king's pardon for, by the statute, it is part of 689, 6 Mod. the judgment that he be infamous and lose the credit of P. C. sap 69. testimony; but he may by a statute-pardon. But in other cases, where the infamy is only the consequence of the judgment, the king's pardon may restore the party to his testimony. Held upon a trial at bar.

(a) Otherwise where convict on an indictment at common law, 3 Salk. 155.

#### 4. Anonymous.

[Paich. 13 Will. 3. B. R.]

F a witness going to sea be by rule of Court examined Deposition of a upon interrogatories before a judge, and the trial come ed before a judge, on before he is gone, his deposition shall not be read, but because going he must appear; for the rule was made on supposal of his beyond sea, canablence. be in England. Vide ante 555, &c. ib. Bull. N. P. 239.

### 5. Inter Oxenden Bar. and Penerice.

[In Canc.]

A Question was in Chancery, Whether a legatee could be a witness against a will? Et per Cur. upon debate, a witness against a will. Et per Cur. upon debate, a witness against a will. Vide ante pl. 3. because he is presumed to be partial in swearing for his own interest: But the legatee, when he swears against the will, swears against his interest, and so is the strongest witness.

Vide ante 548, 651.

## Mords in General.

# Smith versus Wood.

[Mich. 5 W. & M. B. R.]

To call H. whorematter, is fusble in the 18, 119, 137-2 Lev. 63. 2 Keb. 58. I Lev. 116. ı Sid. 433. 1 Jo. 44. 3 Lev. 3500 S. C. Comb. So of wittal. 2 Lev. 66. 1 Mod. 23.

I BEL in the Spiritual Court for these words, You are a rogue, rascal, subsremaster, and son of a persured affi-Spiritual Court. davit-bitch. Selby moved for a prohibition; and all the Vide 3 Lev. 17, words being waived but the word wberemaster, he urged, that it was only a word of heat, and that words of pathon were not defamatory, being regarded by the hearers no more than the words of one non compes, or mad; ira furor brevis eft.

Halt, C. J. To say wheremaster of a man is the same with whore of a woman, which is an ecclefiaftical flan-226. Skin. 390. der. Et per Selby, The reputation of a man is not so nice; but the Court would not distinguish them, and therefore denied the prohibition. Holt, C. J. said, To call a man cuckold was not an ecclefiastical slander, but wittal was; for it imports his knowledge and consent to his wife's adultery. Vide 1 Sid. 248. Cro. Car. 339.

bub, not fuable.

Impudent brazen-faced Belzebub are not suable in the sen-faced Beize- Spiritual Court, for they import passion, but no crime nor Comb. 26, 28, discredit any more than Devil, or Prince of Darkness.

### 2. Coxeter versus Parsons.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 423. S. C.]

Suit lies not in the Spiritual Court for words, charging an offence not punithable there. Vide 2 Lev. 41. Godb. 447. 2 Rol. 295.

Doctor Parsons libelled against Coxeter in the Spiritual Court, for saying of him, he had no sense, was a dunce, and a blockhead; and he wondered the bisbop would lay his bands upon such a fellow, and that he deserved to have his Farell. 31. S. C. gown pulled over his ears: And a prohibition was granted; Case B.R. 231. for a parson is not punishable in the Spiritual Court for being a knave or a blockhead, more than another man; and whereas it was urged, that a parson might be deprived for want of learning; the Chief Justice said, If that be the case he must bring his action at law; for that was a temporal damage. And a prohibition was granted.

## Acebery versus Barton.

[Pasch. 4 Ann. B. R.]

A Woman libelled in the Ecclesiastical Court against Words of iacon-another for these words, jou are a brandy-nosed whore, tinence. you flink of brandy: Mr. Earle moved for a prohibition, infifting, they rather charged intemperance than incon- Comyns, Prohitinence. Vide 2 Ro. Ab. 296. placito 15. 1 Jo. 44. 1 Cro. bition G. 14. 110. 2 Keb. 334, 57, 581. 1 Sid. 433, 1 Mod. 23. 3 Lev. 119. But the Court denied a probibition.

# Actords actionable or not actions able.

## Tassan versus Rogers.

[Mich. 1 W. & M. B. R.]

ASE for words of a butcher, on a colloquium of the Words of a CASE for words of a butcher, on a consequent of the butcher, that the cow died with calving, per cow died a calvquod he lost such and such customers. Verdict and judg- ing, per quod he ment pro quer. in the Marshalfea; but on a writ of error lost his customit was reversed here; for the words are not actionable; able. Comb. 161. and the special damage does not help it; for it is not faid he could not fell the rest of his cow, but that he lost customers.

### 2. Byron versus Elmes.

[Mich. 8 Will. 3. B. R.]

I N case for words, the plaintiff declared, that she being Charge of fornia young woman, the defendant, to hinder her marriage, faitd, what did you go to London for, but to drop your flink? She went to London last winter to lie in, and to my know.

S. C. Comb. ledge several people have lain quith her. And they were held 391. Cases B.R. 106. 1 Rol. 34, not actionable; for it is not having a bastard, but the 36. 1 Sid. 396. fornication is the crime here, and that being punishable in the Spiritual Court, is not punishable here without a temporal loss. Having a bastard was never actionable be-

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fore the statute; nor is it since, unless the parties come within the penalty of the statute, which is only when the parish is chargeable.

### Anonymous.

[Mich. 8 Will. 3. B. R.]

She had a baftard, not actionable, because it do not appear that was chargeable to the parift. 1 Vent. 4. Comb. 137. S. C. 292. ı Sid. 396. 2 Sid. 7, 21. 1 Rol. Abr. 34, 37, 38. Palmer 298.

CASE for these words, she had a bastard child, and verdict for the plaintist; and the Court thought them not actionable, according to Salter and Brown's Cases. . and denied Anne Davies's Cafe, 4 Co. 16. b. for the is not punishable at common law in the king's temporal courts for having a baltard; nor is the punishable by 18 Eliz. unless her bastard be likely to become chargeable to the parish; the statute only extends to such bastards. In other cases she is only punishable in the Spiritual Court for whoring, and may fue there, but cannot fue here too; for the party would be doubly punished by that means. Sed adjournatur.

S. C. 5 Mod. 398.

# Savage versus Robery.

[Pasch. 10 Will. 3. B. R.]

tionable without laying a colloquium of his 3 Lev. 5, 62. Štil. 420. 3 Mod. 112. Comyns, Action for Defamation, G. 3.

Chest, spoke of a trader, not ac-a trader, not ac-defendant faid of him, you are a cheat, and have been defendant faid of him, you are a cheat, and have been a cheat for divers years. Upon the first motion, which was Mich. 9 Will. 3. B. R. Holt, C. J. held, the words trade. I Lev. was Miles. 9 Will. 3. D. K. Man, C. J. Hell, the world's 280. Comber. must be understood of his way of living, and that it 292. 3 Keb. 34. needed no colloquium. But Pasch. 10 W. 3. B. R. Mutata opinione, judgment was arrested (a). Vide 1 Vent. 117, 263. 2 Saund. 307. Jones 156. Raym. 62, 169.

(a) R. ac. Str. 696. Vide Str. 797, 1169.

### How versus Prinn.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 812. S. C.]

Do not vote for HE plaintiff declared, that being a justice of peace him, for he is a and deputy-lieutenant, and having ferved as knight Jacobite, and for of the shire for the county of Gloucester, and intending to Prince of Wales stand candidate again to be knight of the shire for the said and Popery, to defendant in discourse with J. S. speaking of destroy our : a tion, spoken of a the plaintiff and his standing candidate, said, Do not vote justice of peace for him, for he is a Jacobite, and for bringing in the Prince

of Wales and Popery, to defiroy our nation. Verdict for the and deputy lieu. plaintiff, and entire damages.

In arrest of judgment it was objected,

1st, That it was incertain where the Prince of Wales 3 Lev. 30. S.C. should be brought in.

2dly, That there was no fuch person, and the Court could take no notice of him.

3dly, He might mean it legally by act of parliament. 4thly, He is not charged with any act.

5thly, The offices recited were not offices of profit.

Sed per Cur. :

tit, The words being spoken with respect to an Englishman, therefore the bringing in must be supposed to be into England; the rather, because it is said to be, to destroy our nation; and the defendant could not have been found guilty, if he had appeared upon trial to be a Dutchman, as in Cromwell's case, Thou art a murderer; upon evience, it appeared to be spoke in the sense, a murderer of borses; and the desendant was acquitted.

adly, We will take notice of the Prince of Wales, not as really such, but pretendedly such, being mentioned in acts of parliament; and one may gain a name by reputation, as a bastard does that of his reputed father.

3dly, We cannot suppose he can mean to do this fairly; but if he does, it is scandal; for the king and government being Protestant, it is good reason for them to displace him, as not fit to be trusted.

4thly, As to his not being charged with any act, inclimation and principles are sufficient without an act. 3 Lev. 90. 1 Brownlow 5. March 4. 1 Ro. 86. Ellis's

case, and so was Sir Tho. Clargir's case.

5thly, In offices of profit, words that impute either Inoffices of prodefect of understanding, of ability, or integrity, are action-fit, words imput-ing want of abiable; but in those of credit, words that impute want only lity are actionof ability, are not actionable, as of a justice of the peace: able; otherwise He a justice of peace! He is an ass, and a beetle-beaded in offices of ho-justice: Ratio est, because a man cannot help his want of 698. Cro. Car. ability, as he may his want of honesty; otherwise where 223. words impute dishonesty or corruption; as in this case, vide 1 Str. 617. where the office is an office of credit, and the party 2 Ld. Raym charged with inclinations and principles which shew him 1396. 3 Will. unfit, and that he ought to be removed which is a diff. unfit, and that he ought to be removed, which is a difgrace (a).

tenant; held actionable. s Mod. 26. 2 Lutw. 1293. N. L. 410. Far. 107. Halt 652. Farest 107. S.C. Lutw. 1294. **\***[ 695 ]

(a) Judgment for the plaintiff affirmed in the House of Lords, 7 Mod. 113. 1 Bro. P. C. 97.

S. C. 6 Mod. 23. Holt 654.

### Baker versus Pierce.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 959. S. C.]

YOU fole my boxwood, and I will prove it, were held ac-You stole my boxwood, and I tionable, for they tend to difgrace the plaintiff with will prove it, actionable. Vide an imputation of felony, and may be so understood. These pros. page 6%. 6 Mod. 104. 2 Jon. 11, 68, fort of actions stand upon their own bottom, and are under no fet rule, but ought to be encouraged to prevent breaking 195, &c. Poph. the peace. Thou art a thief, and haft stolen my wood, 211. 1 Mod. 22. are actionable, there is no difference between and and for. 3 Lev. 280. To fay a man bas the pox, is not actionable; but to fay Cro. Jac. 39, 2, farther, and got it of a yellow-baired wench in Moorfields, 231, 11, 442, are actionable; not that the international land that way, 16, 2 Keb. 181. he meant the French-per, but the fense leaned that way, are actionable; not that the intendment is necessary that # Sid. 324. 3 Lev. 166. Hob. 305. All. 11, con. Cro. Jac. 430. \* 「696」

## Graves versus Blanchet.

[Paich. 3 Ann. B. R.]

S. C. 1 Vent. 4. z Sid. 396. Hob. 256. 7 Cro. 436. Andrews 376.

See 4 Co. 17, &c. A CTION for these words, She is a whore, and had a Mod. Cas. 148. A bastard by her father's apprentice; judgment was arrefted. The Court faid they could not overthrow fo many authorities. The reason of the law is, that fornication is a spiritual offence; and no action lay at common law for what the common law took no notice of, without special damage.

### Walmsley versus Russel.

[Trin. 3 Ann. B. R.]

that he was chancellor to the bishop, and stood for

parliament-man, and the defendant to defame him faid,

There goes your rare chancellor to suborn witnesses to savear

or fwearing, but where there is perjury and fwearing.

There goes your IN case for awards, the plaintiff in his declaration shewed, rare chancellor to fuborn witnesses to swear against the parfon, not actionable. Vide 3 Lev. 166. 1 Co. 55, 16. S. C. 6 Mod. 200.

against the parson. Powys and Gould, Justices, held them actionable, because they touched him in his office, and fuborning is to be taken in malam partem; and the words were the falser if there was no perjury or swearing. Vide 3 Cro. 93. 1 Lev. 118, 180. 1 Cro. 14, 15, 190. Hard. Vide : Rol. 58. 103, 501. Mo. 243. 1 Vent. 20. 1 Ro. 79. Holt, C. J. and Powell, J. contra, To fay, a man is forfworn is not actionable; a fortiori, to say one suborned another to forfwear: Suborning is not a crime of itself, but as it relates to perjury, and there cannot be a subornation of perjury

Here

Here is nothing faid that relates to his office, or touches it; there goes your rare chancellor, is only a description of the person.

### Turner versus Ogden.

S. C. 6 Mod. 104. Holt 40:

[Hill. 3 Ann. B.R.]

THOU art one of those that stole my Lord Shaftesbury's Words subjectdeer; held not actionable; for though imprisonment ing H. to punishbe the punishment in those cases, yet per Holt, C. J. It actionable, unis not a scandalous punishment. A man may be fined and less scandalous imprisoned in trespass; for there must not only be imprisonment, but an infamous punishment; it is true, call- 1 Jos. 196. ing Papist has been held actionable, but that was only 2 Vent. 265. in respect of the times.

z Roll. Abr. 60. Yelv. 64. 2 Sho. 32. Cro. Eliz. 297.

#### Speed versus Perry.

[ 697 ]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1185. S. C.]

CASE for these words, You are a rascal, and a villain, in Black-bull you have forgot since you lived in the Black-bull yard; yard you could there you could procure broad money for gold, and clip it when money for gold, you had so done, and then the shears could so Series money for gold. you had so done, and then the shears could go. Serjeant and clip it; held Darnell moved in arrest of judgment, because the words to import an act, imputed no act, but a power only. Sed per Cur. Where the matter imputed is confined to a particular place, as you could in such a place, they must be understood to imply an act; for a power is the same in all places. And Powell cited the case of Horne and Powell, Trin. 12 Will. 3. C. B. You may well spend money at law, for you can coin money out of halfpence and farthings, which was held to import an act done, because by a bare power he could never be able to spend money at law; and the Court denied. 1 Ro. 72. placito 9. (a)

(a) Vide Peake v. Oldham, Cowp. 275.

# CHords indictable and not indict. able.

### Domina Regina versus Langley.

[Hill. 2 Atm. B. R. 2 Ld. Raym. 1029. S. C.]

Words of flander (poken of a mayor, not in-dictable; otherwife if written. Comb. 46, 66. S. C. 6 Mod. 124. 5 Salk. 190. Holt 654. Vide Str. 420.

**[698]** 

Chase de verborum propulationibus in the commission of oyer and termimer, what it refers

NDICTMENT for faying to the mayor of Salifbury, You, Mr. Mayor, I care not a fart for you; and at another day; You are a regue and a rescal. On demurrer, Mr. Ward argued, they were not spoken while he was in the execution of his office, and that this is no offence indictable. Vide 1 Ro. Rep. 79. 11 Co. 95. 3 Cro. 78, 689. Mo. 247. 1 Vent. 16. Vide cont. 1 Cro. 503, 504. 2 Bulft. 139, 140. 3 Mod. 139. Holt, C. J. Thefe words are not indictable, for the mayor was not in execution of his office nor a patent officer. It might be more doubtful if the words were of a patent officer; for then it is an afpersion to the queen and government that employs him. Here it does not appear the mayor was a justice of peace; at least not by commission from the king; yet if these words had been written, an indictment would have lain. Vide 1 Sid. 270. 1 Lev. 139. Et per totam Curiam, Words that directly tend to the breach of the peace, as if one man challenge another, are indictable; and the commission of over and terminer de propalationibus verborum, is to be construed of words against the government, or scandalum magnatum, &c. But for these petit offences, which are contra bonos mores, the law has another provision, by requiring surety for the peace and good behaviour; in default whereof the magistrate may commit him, when spoken out of court; and when in court, then the magistrate may proceed summarily against him, and fine him for the contempt (a). Quashed.

(a) Or commit him, 7 Mod. 29. 3 Salk. 198. Wood's Inft. 447, 486. 11 Co. 43.

Vide Cro. Car. 223.

Domina Regina versus Wrightson.

[Pasch. 7 Ann. B. R.]

tice of peace: He and a coxcomb, and knows no

Words of a just INDICTMENT for faying of Sir Rowland Gwin. who was a justice of peace, in discourse concerning is a fool, an als, a warrant made by him, Sir Rowland Gwyn is a fool, an afs, and a coxcomb, for making fuch a warrant, and he knows

no more than a flickhill, held naught on dernurrer. The more than a Court held, that here was a breach of good manners, and dicable, but he might be bound to the good behaviour; but here was cause to bind to mo indictable offence. The counsel urged, that though the good behavi-words spoken of a magistrate in the execution of his office, 56, 1, 58, 4, might be indictable as a matter that disturbs the public 240, 6, 434, 3, peace; yet not when it refers to some particular act. Vide 557, 3. S. C. Rep. A. Q. 166. 2 Keb. 494. Hutt. 131. 1 Cro. 362. 3 Mod. 139. 1 Vent. Holt 354. Anne 169. And Domina Regina versus Soley, Mich. 4 Ann. 695. B. R. who was indicated for these words, He is not fit to be Vide Str. 420. a justice; for if a man is before him, be will give it right or 1158. wrong where his affection is; and ruled the indictment lay not. Et per Holt, C. J. To say, a justice is a fool, or an als, or a coxcomb, or a blockhead, or a bufflehead, is not indictable; quod fuit concess. per Powell. Vide 2 Ro. Rep. 78. 4 Inft. 181.

# Writ.

damus, Replevin, Retorns. Hob. 83.

#### Touchin's Cafe.

S. C. 1 Salk. 48, 49. 6 Mod. 164. & 276 to 287.

[Mich. 12 Will, 3. B. R. Vide title Amendment,]

N all continued writs the alias must be tested the day State Trials 659 the former was returnable. Vide ante 554. to 706.

#### Dominus Rex versus The Mayor of Hertford.

[Mich. 11 Will. 3. B. R.]

INFORMATION in nature of a que warrante; a Process out of venire issued returnable in Easter-term, and a distringus the Crown-office may be returnable in Trinity, and an alias distringus fifteen days from the teste able in fifteen the same Trinity term : It was objected, that this was ir- days, except of regular, for that all process on the crown side is returnable must be de torde termino in terminum, and not in fifteen days, and the mino in terminum. precedents are so: It was answered, that process of outlawry was the only process returnable de termino in terminum. Vide 2 Inft. 550. 1 Inft. 134. 9 Co. 119. b. [ Note; These authorities are general, and make no distinction.] Quose the pro-Holt, C J. said, There was no question but the process cells, vide a H.

might edition.



might be fued out returnable in fifteen days; and Sir & muel Aftry reported the practice according to this diverfity.

S. C. Ante451, 3. Dominus Rex versus The Mayor, &c. of Abingdon.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

perfors who are do the act. Mod. Cales 133.

Vide Str. 55,

[ 700 ]

With of manda-mus ought to be A Mandamus was directed Jacobo Courteen majori, bulli-mus ought to be wis, & omnibus principalibus burgensibus burgi de Abing-tirected to the don, who by the constitution were to chuse the mayor out of fuch persons as should be proposed by the commonalty, post. pl. 6. commanding them to chuse accordingly. It was objected to the writ, that it was mildirected; for that this was but a part of the corporation, viz. chief burgeffes; whereas the name of the corporation was, mayor, bailiffs, and burgesses; and it was urged that persons constituting a corporation could be confidered but in one of these two capacities, viz. their corporate or their natural; and that the writ must be directed to them, either by their names, or as a corporation; and they cited Holt's case, 2 James 52. in point. Holt, C. J. said, That case was not law; that Serjeant Pemberton, Sir William Jones, and all the learned part of the bar, wondered at the resolution: And though it should be true, that a mandatory writ might be directed to the whole corporation, yet it could not be necessary if should be directed to more than those, or that part of the corporation that was concerned in the execution of the thing required; for it is not in the power of others to put the command of the writ in execution: And the writ was held good.

S. C. FareA. 29. Holt 761. 3 D. 121. p. 6. Ante 273.

Shirley versus Wright.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 775. S. C.]

Writ of execution returnable two terms from meine process,

IN debt for an escape of one taken upon a ca. sa. which appeared to be returnable the term next but one after the teffe, is well, the teffe, so that a term intervened. After a verdict for the plaintiff, it was moved in arrest of judgment, that the writ was merely void, and confequently there could be no escape, and the sheriff did well to let him go; and 3 Cro. 468. was cited as a case in point. On the other side, to shew that a writ may be faulty, and yet not void, were cited Poph. 271. Dy. 67, 175. 21 H. 7. 16. Sty. 339. 1 Ro. 242. 3 Cro. 188. Mo. 274. 1 Cro. 271. 2 Bulft. 256. 2 Ro. Rep. 432. Per Holt, C. J. Escape lies against the theriff; and there is a difference between a compies in mean

process, and a capias in execution: In mean process, if a term be omitted the writ is void in all actions personal (a), and the sheriff shall not be charged; for the cause is discontinued and out of court by the intermission; and by not having a day in court by the return of the writ as he ought, the party may be at great prejudice by reason of the imprisonment in the mean time.

But in executions, a ca. fa. omitting a term, is not void; 1 Lev. 254. for the party is not to have a day in court; his cause is at 1 Saund. 161, an end, and he must be in prison, whether the writ be re- Writ bearing turned, or not; nor is it necessary it should be returned. teste out of term Per Curiam. The plaintiff had judgment, nis, &c.

And in the same case, Holt, C. J. said, If a writ of exe-able. cution bear tefle out of term, the sheriff is justifiable, and yet shall not be liable to an action of escape, for it is a void writ.

is void, but the theriff is justifi-

(a) R. ac. Parsons v. Lloyd, 2 Bl. Rep. 846. 3 Wilf. 341.

### Helliot versus Selby.

[701]

[Trin. 2 Ann. B. R. 2 Ld. Raym. 902. S. C.]

N replevin the declaration was, that the defendants fum- Defendant canmoniti fuerunt ad respondend. de placito captionis & injusta not take advandetentionis averiarum ipsius, &c. The defendant avowed, tage of an ill ori-and the plaintiff pleaded in bar, and the defendant made a cital, but upon naughty rejoinder, upon which it was demurred. And over or certionow Weld took exception to the original, that it was non-rari. Vide ante fense, and that there was no such word as averiarum. Holt, 6 Mod. 28. S.C. C. J. If the original had been averiarum, it had been 3 Salk. 355. naught; but this is only a recital of an original, and the Court will not judge upon a recital; but the way to take advantage is, to crave over; for this recital is only a short intimation to the Court of what the kind of the plea is. Powell, J. A replevin may be by plaint in the county, as Vide H. Bl. well as by original here, because it is summonitus. And if 250. Str. 225. this case had been here by error out of the Common Pleas, in which case the plaintiff could not have taken advantage of this fault by (a) over, then he must have alleged diminution and prayed a certiorari; and if the original returned had been fo, the Court would have reverfed the judgmen:.

(a) Query if it should not be "without eyer?"

#### Domina Regina versus The Mayor, &c. of Hereford.

[Tris. 4 Ann. B. R.]

Writ of mandadirected to the to do the act. Viae ante 431, **5**5-

Writ of manda.

Mandamus to admit one to the office of town-clerk mus ought to be A mandamus to admit one to the manor and alderman of Here. was directed to the mayor and aldermen of Herepersons who are ford; and Mr Eyres urged the writ ought to be directed to the body politic, in whom the inheritance of the franchife was, by the name of incorporation, and that was, pl. 3. Mod. mayor, aldermen, and cirizens; and indeed the writ was Cafer 123, 509, returned by the mayor, aldermen, and citizens in this S. C. 6 Mcd. 309. Rep A.O. case, and cited 3 Bulft. 190. Hols, C. J. denied that case, 188. Vide Str. and said, it is enough to direct the writ to those that are to execute the writ, or do the thing required: Then it appeared the mayor only was to admit; whereas the writ was directed to the mayor and aldermen; and Holt, C. J. thought the word aklermen was furplufage, and the writ well enough; Powell, J. contra. Writs ought to be directed to those, and to those only that are to obey the writ: How will people know who are to obey the writ, if the direction is infiguificant or immaterial? If a writ be directed to the coroner and sheriff, where it ought to be to one only, it is naught: Powys and Gould, Justices, agreed, and the writ was quashed.

## [702]

### Anonymous.

[Trin. 13 Ann. In Canc.]

No exeat regression to flay H.'s A No exeat regnum was granted to flay the desendant from going to Scotland; for though that is not out of going to Scotthe kingdom, yet it is out of the reach of the process of Union. Of ne this Court, and within the fame mischief (a). exeat regnum,

ice 2 Inft. 54. 4 Mod. 179. 3 Mod. 127, 169. 2 Show. 227, &c. 1 Chan. Caf. 115, 116. 2 Chan. Caf. 245. Of homine replegiando's & withernams, vide tit. Replevin. Vide ante 581. Fareft. 9.

> Note; A writ of covenant is not amendable cither by common law or by flatute. I Salk. 53.

nizance shall be, that he does not go out of the realm or to Scotland, IP. Wms. 253. S. C. Mr. Cox has added Done's case, of which the following is a

(a) The condition of the recog- not be granted except on bill filed, ex parte Brunker, 3 Atk. 312. 2dly, That it shall not issue on a mere legal demand for which the defendant might a note to that report, by the name of have been holden to bail, ex parte Brunker, ubi supra; Auon. 2 Atk. 210. copy: -" With respect to this writ, it Pearne v. Lifle, Ambler 76.; Atkinson has been determined, 1st, That it can- v. Leonard, 3 Bro. Cb. 218.; but from she

the last-mentioned case it seems that it shall issue where the courts of law and equity have concurrent jurisdiction. It may also issue at the instance of a wife who is fuing for alimony in the Spiritual Court, because that Court cannot hold to bail, Sir 7. Smithson's case, 2 Vent. 345.; Read v. Read, I Chan. Ca. 115.; Anon. 2 Atk. 210.; Pearne v. Liste, ubi supra. 3dly, The demand must be certain in its nature, Anon. 1 Atk. 521.; Anon. 1 Bro. Cb. 376. 4thly, That in general the application must be supported by an affidavit swearing positively to the debt, Rice v. Gualtier, 3 Aik. 501.; Anon. 2 Vez. 489.; but on bill for an account, it is sufficient for the plaintiff to fwear to the balance as to his belief, Rice v. Gualtier, ubi supra. Where the demand is against an administrator, &c., the plaintiff should also swear to his belief of affets come to the defend-

ant's hands, Anon. 2 Vezey 489. 5thly, This writ may issue against a feme covert executrix, whose husband is out of the jurisdiction, Jerningham v. Glass, 3 Atk. 409., and Ambler 62. S. C.; and Moor v. Mellish, therein cited. 6thly, But as the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the fuit, the Court always inclines to discharge the writ upon such security being given, Baker v. Dumaresque, 2 Atk. 66.; Jerningham v. Glass, ubi sup.; Robertson v. Wilkie, Amb. 177.; Atkinson v. Leonard, ubi supra. Whether the writ shall issue against a foreigner or person usually resident out of the jurisdiction, in respect of a demand which originated abroad, and is there fuable, vide Pearne v. Liste, Robertson v. Wilkie, and A. kinson v. Leonard, ubi supra.

# Pleadings to the Cales.

Pleas before our Lord the King at Westminster. of the Term of Easter in the Seventh Year of the Reign of our Lord William the Third, now King of England, &c. Roll. 242.

Sir John Dalston against Janson.

[3 Ld. Raym. Entries, 115. S. C.]

Salk. 204.

Hoit 7. S C.

A count on the dustom of the realm against a

Safk. 10. 6 Mod. London, BE it remembered, That heretofore, to wit, 50. Comb. 333. to wit. "BE in Hilary term last past, before the lord the Cases B. R. 73. 4 king, at Westminster, came Sir John Dalston, knight and " baronet, by John Pratt his attorney, and brought into the court of our faid lord the king, then there, his ceret tain bill against Josbua Janson, a common carrier, in " the custody of the marshal, &c., of a plea of trespass " upon the case, and there are pledges of prosecuting, to " wit, John Roe and Richard Doe, which faid bill followeth in these words, to wit, London, to wit, Sir John " Dalflon, knight and batonet, complains of Joshua Jancommon carrier. " fon, a common carrier, in the custody of the marshall " of the Marshalfea of our lord the king, before the king " himself being, for that, to wit, That whereas the said " Joshua, on the fixteenth day of March, in the year of " our Lord one thousand six hundred and ninety-three, 44 and long before, and ever fince, has been and still is a common carrier of goods and chatte., and for his pro-" fit used to bear and carry the goods and chattels of all " persons whatsoever requiring such carriage, from Wake-" field in the county of York to London, and from London " aforefaid to Wakefield aforefaid, throughout all the faid " time for the reward to be had for the same. " whereas by the law and custom of this realm of Eng-" land, every common carrier of goods and chattels, who " receives goods and chattels fo to be carried, is obliged " to preferve and carry the fame without any diminution " or lofs, fo that by the default of fuch common carrier or his fervant, no damage may any ways happen there-" unto. And whereas the faid Sir John, on the faid fix-"teenth day of March in the year of our Lord one thou-" fund fix hundred and ninety-three abovefaid, at London " aforefail, to wit, in the parish of Saint Mary le Bow in

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the ward of Cheap, was possessed of the following goods 44 and chattels, to wit, of one deal box, and one hundred so pieces of golden coin called guineas, of lawful English "money, as of his proper goods and chattels: And the se faid Sir John being to possessed on the faid sixteenth day " of March one thousand six hundred and ninety-three " aforesaid, at London aforesaid, to wit, in the parish and " ward aforesaid, delivered the said box with the said one hundred pieces of golden coin being in the fame, to the " faid Joshua, to carry the same safely and securely for " hire from London aforesaid to Wakefield aforesaid, in the county of York aforefaid, and there deliver the same to " the aforesaid Sir John: And the aforesaid Joshua then s and there received and had the faid box, and the faid " one hundred pieces of gold in the fame being, to carry " and deliver in manner aforesaid: Nevertheless the said " Jostua hath not at any time hitherto delivered the said 66 box with the faid one hundred pieces of gold in the " fame being, to the faid Sir John, but the faid box, and " the faid one hundred pieces of gold coin in the fame be-"ing, afterwards, to wit, on the seventeenth day of " March in the year of our Lord one thousand fix hundred " ninety and three aforefaid, at London aforefaid, in the parish and ward aforesaid, for want of the safe keeping " thereof by the faid Josbua, were destroyed and lost.

"And whereas also, on the said sixteenth day of March Trover laid in in the year of our Lord one thousand fix hundred ninety the same held and three abovesaid, at London aforesaid, to wit, in the wisson 319. or parish and ward aforesaid, the said Sir John was possessed contraof the other goods following, to wit, of one deal box 44 and one hundred pieces of golden coin called guineas, of 46 lawful English money, as of his proper goods and chat-" tels, and being so possessed, the said Sir John afterwards, '66 to wit, the same sixteenth day of March, in the year of " our Lord one thousand six hundred ninety and three " aforesaid, at London aforesaid, in the parish and ward 46 aforefaid, calually loft those goods and chattels out of " his hands and possession, which said goods and chattels afterwards, to wit, the same sixteenth day of March, " in the year of our Lord one thousand six hundred ninety " and three abovefaid, at London aforesaid, in the parish 44 and ward aforefaid, by finding came to the hands and " possession of the said Josbua: Yet the said Josbua, " knowing the goods and chattels last before-mentioned to be the proper goods and chattels of the faid Sir John, " and to him the faid Sir John of right to belong and ap-" pertain, yet fraudulently contriving and intending craf-" tily and subtilly to deceive and defraud the said Sir John, 46 hath not yet delivered the goods and chattels last before[705]

Pica.

"mentioned to the faid Sir John, although often tequested, &c., but afterwards, to wit, the seventeenth " day of March, in the year of our Lord one thousand fix " hundred ninety and three aforesaid, at London afores faid, in the parish and ward aforesaid, converted and of disposed of the goods and chattels last mentioned to the " proper use and advantage of him the said Jesbua, to the damage of the said Sir John of one hundred and fifty " pounds: And therefore he brings this suit, &c. 46 And now at this day, to wit, Wednesday next after fifet teen days from the day of Easter in this same term, un-" til which day the said Joshua had leave to imparle to the " faid bill, and then to answer, &c. before the lord the " king at Westminster, comes as well the said Sir John 66 Dalfton, knight and baronet, by his attorney aforesaid,

" as the faid Josbua by William Midgeley his attorney, and "the faid Josbua defends the force and injury when, &c., " and faith that he is not thereof guilty. And of this he " puts himself upon the country, and the said Sir John " Dalfton does so likewise, &c. Therefore let a jury " come thereupon before the lord the king at Westminster, " on Tuesday next after one month from the day of Easter, " and who neither, &c., to recognize, &c., because as " well, &c. The same day is given to the said parties

Pleas before our Lady the Queen at Westminfter, of the Term of St. Michael in the Second Year of the Reign of our Lady Anne,

now Queen of England, &c. Roll 398.

The Earl of Banbury against Woods and his Wife.

" there, &c."

Salk. 5. 6 Mod. London, " THO MAS Woods merchant, and Mary his 84. 3 Salk. 20. to wit. " Wife, were attached to answer Charles Holt 41. S. C. " Earl of Banbury and Mary Countess of Banbury his " wife, in a plea, why they took the faid countefs, and " her so taken detain, &c. And whereupon the said earl 44 and countefs, by Richard Longford their attorney, comof plain, that the faid Thomas Wood and Mary his wife, on "the twentieth day of April, in the second year of the " reign of our Lady Anne, now Queen of England, &c., " at London aforesaid, to wit, in the parish of St. Helen in the ward of Bishopsgate, the said countess took, and her " so taken do yet hold and detain: Wherefore they say they are injured, and have damages to the value of ten thousand pounds: And they bring this suit, &c.

" And the faid Thomas Woods and Mary his wife, by Rich-" ard Ash their attorney, come and crave oper of the original " writ aforesaid, and of the return of the same writ; and they are read to them in these words, to wit, Anne, by " the grace of God, of England, Scotland, France, and " Ireland, Queen, Defender of the Faith, &c., to the see theriffs of London, greeting: Whereas we have often-"times commanded you, that you should justly and without delay replevy Mary the wife of Charles Earl of Ban-" bury, whom Thomas Woods merchant, and Mary his " wife took, and her so taken do detain, as it is said, un-" less she was taken by the special command of us, or of " our Chief Justice, or for the death of any person, or for " our forest, or for any other guilt, wherefore, according to the custom of England, the is not repleviable, " lest we should further hear claim thereof for desect of " justice; or that you would signify to us the cause why " you would not or could not execute our mandate for-" merly to you thereupon directed: And you despising our faid precepts, as we have been informed, have not 46 hitherto taken care to replevy the faid Mary the wife of 46 the faid earl, or to fignify unto us the cause why you would not or could not do it; in manifest contempt of 46 us and our mandates, and to the great damage and se grievance of them the faid earl and countels, whereat we very much wonder and are moved. Still we com-" mand and firmly enjoin you, that you replevy the faid "Mary the wife of the faid earl, according to the tenor of our faid mandates to you before directed for that 44 purpose, or that you yourselves be before us from the 46 day of St. Michael in one month, wherefoever we shall 44 then be in England, to shew why our said mandates so " often to you directed, you have contemptuously refused 44 to execute. And have you there this writ. Witness our-" self at Westininster, the twenty second day of June in "the second year of our reign (Cafar). By virtue of " this writ to us directed, we do certify that no other " writ or mandate of our faid lady the queen, of reple-"vying the within-named Mary the wife of Charles Earl " of Banbury, whom the within-named Thomas Woods and Mary his wife have taken, and her so taken do de-44 tain, as within specified, than the writ of pluries reple-" vin of the faid Mary the wife of Charles Earl of Banbury, came to our hands, or was delivered to us. And fur-"ther we do certify to the faid lady the queen, that the " faid Mary, the wife of Charles Earl of Banbury, is re-" moved

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"moved afar off to places to us unknown, by the said Thomas Woods and Mary his wife, wherefore we can"not replevy the said Mary the wife of the said Charles
"Earl of Banbury, as we are within commanded. The
"answer of Sir Gilbert Heathcote, and Joseph Wolfe Es"quire, sheriffs.

"Which being read and heard, the faid Thomas Woods

secause they say that by the form of the statute the adbecause they say that by the form of the statute the addition of the village, or hamlet, or place, and county,
of the residence of the said Thomas ought to be contained in the said original writ of the said Charles Earl
of Banbury, and Mary Countess of Banbury his wise:
And this they are ready to verify. Wherefore because
such addition is not contained in the said writ, the said
Thomas and Mary pray judgment of the said writ, and

" that the said writ be quashed, &c.

"And the faid Charles Earl of Banbury, and the faid " Mary Countess of Banbury his wife, say, that notwith-" standing any matter by the said Thomas and Mary his " wife above pleaded in abatement of the writ, the writ of the faid earl and countefs ought not to be quashed, " because they say that the plea aforesaid, by the said Tho-" mas and Mary his wife pleaded in manner and form 44 aforefaid, and the matter in the same contained, are not 66 sufficient in law to quash the said writ of them the said 66 earl and countess. To which said plea they the same fe earl and countess need not, neither are they in any manee ner bound by the law of the land to answer; and this they are ready to verify; wherefore for want of a fuffi-" cient plea in this behalf of them the said Thomas and " Mary his wife, they the faid earl and counters demand so judgment, and that the writ of them the faid earl and counters may be adjudged good, and that the faid The-" mas and Mary may further answer to the said writ, &c. " And the faid Thomas Woods and Mary his wife fay, " that the faid plea by them the faid Thomas and Mary si in manner and form aforefaid pleaded, and the matter " therein contained, are good and fufficient in the law to es quash the said writ of them the said earl and countess, which faid plea and the matter therein contained, they " the faid Thomas and Mary are ready to verify, as the " Court, &c. And because the said earl and countess 66 have not answered to the faid plea, nor have hitherto 44 any ways gainfaid it, they the faid Thomas and Mary, " as before, pray judgment of the aforelaid writ, and that f' the same writ be quashed, &c.

"But because the Court of the said lady the queen now here, is not yet advised of giving their judgment of and concerning

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«concerning the premises, day is therefore given to the se said parties before the lady the queen, until . . . . . "wherefoever, &c., of hearing their judgment of and con-" cerning the faid premises, because the Court of the faid " lady the queen now here, is not yet thereof, &c."

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael in the First Y ar of the Reign of our Lady Anne, now Queen of England, &c. Roll 344.

[ 708 ]

Haywood against Davies and others.

Middlesex, "BE it remembered, That on Friday next Far. 104. Salk. to wit. "BE after three weeks from the day of St. 4. S. C. 66 Michael in this same term, before the lady the queen at Westminster, comes Rebecca Haywood by William Smyth 66 her attorney, and brings into the court of the faid lady 46 the queen now here her certain bill against Margaret " Davis, otherwise Davison, and Mary Bonner in custody of the marshal, &c., of a plea of trespass, and there are 66 pledges of profecuting, namely John Doe and Richard « Roe, which said bill followeth in these words, that is to 66 fay, Middlesex, to wit, Rebecca Haywood complains of Trespais for Marg. ret Davis, otherwise Davison, and Mary Bonner tering of the in the custody of the marshal of the Marshalfea of our plaintiff's close lady the queen, before the queen herself being, for that and yard, and they the same Margaret and Mary, on the first day of possession. " October, in the first year of the reign of our lady Anne, " now Queen of England, &c., with force and arms, &c., " the close and court-yard of the faid Rebecca in the parish of Stebunheath, otherwise Stepney, in the county of Mid-" dlesex aforesaid, broke and entered, and her the said Rebecca, in the quiet use and occupation of the said close " and court-yard, did then and there disturb and hinder; " and also for that they the same Margaret and Mary af-" terwards, to wit, the day and year aforesaid, with force " and arms, &c., another close and court-yard of the " same Rebecca, in the parish and county aforesaid, did 66 break and enter, and five hundred pails of water and other water of the same Rebecca, to the value of twenty 66 shillings, from and out of a certain fountain of her the " same Rebecca, in the parish and county aforesaid being, " without the licence of her the said Rebecca, and against

# Pleadings to the Cales. her will, from and out of the fountain aforesaid, then

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" and there did take and carry away; and also for that they the same Margaret and Mary afterwards, to wit, the same day and year last abovesaid, with force and " arms, &c., a great quantity of dirt, soil, and water, in " and upon the land and another court-yard of the fame " Rebecca in the parish and county aforesaid, did then and " there put, place, pour out, and cast forth, and other enormities to the same Rebecca did then and there com-" mit, against the peace of our said lady the queen that " now is, and to the damage of her the faid Rebecca thirty " and nine shillings: And therefore she brings this suit, " &c.

Plea of tenancy in common in abatement.

" And the faid Margaret and Mary in their proper ec persons come and defend the force and injury, &c. and " pray judgment of the faid bill of her the faid Rebecca, 46 and that the same bill may be quashed, because they 66 fay that the close and court-yard, and also the places is in which the faid trespasses are supposed to be done, are, and at the same time when, &c. were one acre of 16 land, and that the faid Rebecca at the same time when, 66 &c. had nothing in the same acre of land, unless tosee gether and undividedly with the faid Mary Bonner, who es is in full life at the parish of Stepney in the county of " Middle fex: And this they are ready to verify. Where-66 fore they pray judgment of the faid bill, and that the " same bill may be quashed, &c.

44 And the faid Rebecca faith, that the aforefaid bill of

Replication.

"her the faid Rebecca, for the reason before alleged, 66 ought not to be quashed, because she faith me, at the see feveral times the feveral trespasses aforesaid are supso posed to be committed, was fole seised of the said close " and court-yard in the declaration of her the faid Re-66 becca first mentioned, and also of the said close and court-yard in the declaration aforesaid of her the said Rebecca secondly mentioned, and of the aforesaid foun-66 tain in that declaration in like manner mentioned, and 45 also of the third court-yard in the said declaration of " the faid Rebecca thirdly mentioned, and that the afore-" faid Margaret and Mary, at the faid feveral times when, " &c. did commit the feveral trespasses aforesaid, as the tenancy in com- ce faid Rebecca by her faid declaration above complains 46 against them; without that, that the said Mary Bonner at the respective times aforesaid, or any of them, had " any thing in the faid premises, or any of them: And 66 she prayeth that this may be inquired by the country.

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Demurrer.

" And the faid Margaret Davis, otherwise Davijon, 46 and Mary Bonner say, that the plea asoresaid by her the faid Rebecca Haywood, in manner and form above

es by their faid replication pleaded, and the matter in the see same contained, are not sufficient in law to compel sthem the faid Margaret and Mary to answer the bill of her the said Rebecca, to which said plea they the se fame Margaret and Mary need not, neither by the law of the land are they bound in any manner to answer: 46 And this they are ready to verify. Wherefore for want of a sufficient replication of the said Rebecca in this be-46 half, they the faid Margaret and Mary as before pray iudgment of the faid bill of her the faid Rebecca, and "that the same bill may be quashed. And for causes of "demurrer in law in this behalf, according to the form ee of the statute in such case lately made and provided, 46 the faid Margaret and Mary here shew to the Court these causes following; For that the said plea of her the faid Rebecca is double, uncertain, and wants form, and concludes to the country.

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44 And the faid Rebecca Haywood faith, that the plea Joinder in de-46 aforesaid, by her the seid Rebecea in manner and form so aforesaid in her replication above pleaded, and the matster in the same contained, are good and sufficient in 46 law to compel them the faid Margaret Davis and Mary 66 Bonner to answer the bill aforesaid of her the said Re-66 becca; which faid plea, and the matter in the same 66 contained, the same Rebecca is prepared to verify and of prove as the Court, &c. And because the said Magaer ret and Mary have not answered that plea, nor have 66 hitherto in anywise contradicted it, the same Rebecca of prays judgment; and that the faid Margaret and Mary may further answer the said bill of her the said Re-" becca, &c. But because the Court of our said lady the 46 queen now here, are not yet advised of giving their iudgment of and concerning the premiles, a day there-"fore is given to the faid parties before our lady the queen at Westminster until Tuesday next after eight days from the day of St. Martin, for hearing their judgment of and concerning the premises, for that the Court " of our faid lady the queen now here is not yet there-" of, ♂c. " A Respondeas ouster awarded."

Pleas before our Lady the Queen at Westminster, in the Term of Saint Michael in the Fifth Year of the Reign of our Lady Anne, now Queen of Great Britain, &c. Roll 439.

#### Stroud against Lady Gerrard.

Middlesex, "BE it remembered, That on Wednesday to wit. "BE it remembered, That on Wednesday of Salk. S. S. C. 66 Saint Michael in this fame term, before our lady the " queen at Westminster, cometh Thomas Stroud by Daniel "Brown his attorney, and produceth in the court of our " lady the queen that now is here his certain bill against [711] "the lady [or dame] Elizabeth Gerrard, otherwise Garse rett, in the custody of the marshal, &c. of a plea of "trespals upon the case, and there are pledges of prose-66 cuting, to wit, John Doe and Richard Roe, which faid " bill followeth in these words, to wit, Middlesex, to wit, "Thomas Stroud complains of the lady Elizabeth Gerrard, otherwise Garrett, in the custody of the marshal of the " Marsbalsea of our lady the queen before the queen her-" felf being; for that, to wit, that whereas the faid 66 Elizabeth on the tenth day of Ollober in the fifth year " of the reign of our lady Anne, now queen of England, " &c. at the parish of St. Clement Danes in the county of Indebitatus affumpfit for mafon's work and " Middlesex aforesaid, was indebted to the said Thomas in materials found. 66 fifteen pounds of lawful English money, as well for "divers mason's works by him the said Thomas for the 46 aforesaid Elizabeth at the special instance and request of 66 the said Elizabeth before then made and performed, as 66 for stone and other materials and necessaries in and " about the doing and performing the faid works used " and employed by him the faid Thomas, at the like in-" stance and request of the said Elizabeth found and pro-" vided; and being fo thereupon indebted, she the same " Elizabeth in consideration thereof undertook, and did " then and there faithfully promise the said Thomas that " fhe the said Elizabeth, when thereafter required so to 66 do, would well and faithfully pay and fatisfy the faid Quantum meruit " fifteen pounds to the faid Thomas: And whereas also tor the fame. "the faid Thomas, afterwards, to wit, the same day and " year abovementioned, at the parish aforesaid in the " county aforesaid, at the like instance and request of the 66 fame Elizabeth had done and performed for the afore-" faid Elizabeth divers other mason's works, and had so sound and provided and used stones and other materials and things necessary in and about the doing and per-66 forming of the faid works last mentioned; the faid 66 Elizabeth in confideration thereof, afterwards, to wit, "the same day and year aforesaid, at the parish aforesaid in the county aforesaid, undertook, and then and there " faithfully promised the said Thomas, that she the same 66 Elizabeth would well and truly pay and fatisfy to the 66 faid Thomas, when the should afterwards be rees quested the same, as well so much money as the 66 fame Thomas should reasonably deserve to have for "the faid other mason's works last mentioned, at the "time of the doing and performing the fame, as also " fo much money as the aforesaid stones and other ma-46 terials and things necessary last mentioned, at the time 46 of the finding and providing of the same were reason-44 ably worth: And the said Thomas in fact saith, that he the faid Thomas, for the faid mason's works last men-"tioned, at the time of doing and performing the same, reasonably deserved to have other fifteen pounds of like " lawful English money; and that the faid stones and other materials and things necessary last mentioned at "the time of the finding and providing of them were reasonably worth other fifteen pounds of like lawful 66 English money, to wit, at the parish aforesaid in the county aforesaid, of which the said Elizabeth then and 46 there had notice: And whereas also the said Elizabeth, " afterwards, to wit, the fame day and year abovefaid, at the parish aforesaid in the said county, was indebted to "the said Thomas in other fifteen pounds of like lawful " English money, as well for other mason's work for the 66 said Elizabeth, by the same Thomas, at the like special Indebitatus asinstance and request of the same Elizabeth, before that sumpsit as well time wrought and done, as for divers materials and formation's work as materials. "things necessary, used in and about the same work by " the aforesaid Thomas, at the like instance and request of "the faid Elizabeth, before then bought, found, and pro-" vided, as for divers sums of money, for the said Eliza-66 beth, by the same Thomas, at the like instance and request " of her the faid Elizabeth, before that time laid out and " disbursed; and being so indebted the said Elizabeth afst terwards, to wit, the day and year aforefaid, at the pa-66 rish aforesaid in the county aforesaid, in consideration 66 thereof undertook, and then and there did faithfully of promise the said Thomas, that she the same Elizabeth 46 would well and faithfully pay and fatisfy the faid last-66 mentioned fifteen pounds to the aforesaid Thomas, when 66 she should be thereunto afterwards requested: And whereas also the said Elizabeth afterwards, to wit, the " fame day and year above mentioned, at the parish afore-

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faid in the county aforesaid, in consideration that the s faid Thomas, at the like special instance and request of

Bresch

Indebitatus af- 66 the faid Elizabeth, had wrought and done for the same sumplit for work. 66 Elizabeth other work belonging to a mason, [or mason's work,] took upon herfelf, and then and there did faith-" fully promise the said Thomas, that she the same Elizabetb would well and truly pay and fatisfy twenty pounds " of the like lawful money of England, for the faid lastmentioned work by the same Thomas for the said Eliza-66 beth so wrought and done as aforesaid, to the same Thomas, when thereunto after required: Yet the faid Eli-22 2abeth her several promises and assumptions aforesaid in on nowife regarding, but contriving and fraudulently in-46 tending the same Thomas in this behalf craftily and " fubtilly to deceive and defraud, the aforefaid feveral 66 fums of money, or any part thereof, hath not yet paid to the said Thomas, (although the said Elizabeth by tho se said Thomas afterwards, to wit, the twelsth day of Osto-66 ber in the fifth year aforesaid, at the parish aforesaid, in "the county aforefaid, and oftentimes afterwards, was required so to do,) but hath hitherto altogether refused, and still doth refuse to pay him the same. Wherefore 66 the faid Thomas faith that he is injured, and hath da-

Misnomer pleaded in abatement, 66 aforesaid Thomas exhibited his bill by the name of the

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Traverie.

er per person comes and desends the force and injury, &c., " and prays judgment of the faid bill, because she faith that she was baptized by the name of Honor, to wit, at 66 the parish of St. Clement Danes aforefaid, and by the fame name hath been always from her baptism to this " time known and called; without that, she the faid Ho-" nor now is, or ever was known or called by the name of Elizabeth, as by the bill aforefaid is above supposed: 46 And this the is prepared to verify: Wherefore the prays " judgment of the aforesaid bill, and that thesaid bill may

ss mage to the value of fixty pounds: And therefore ho

Lady Elizabeth Gerrard, otherwise Garret, in her pro-

" And the Ludy Honor Gerrard, against whom the

" brings this fuit, &c.

" be quashed.

"And the faid Thomas Stroud prays a day to imparle to "the plea aforefaid; and it is granted to him, &c. And " hereupon a day is given to the faid parties before our 46 lady the queen at Westminster, until Thursday next after eight days from the day of St. Hilary, that is to fay, for the aforefaid Thomas to imparle to the aforefaid plea, and 44 then to reply, &c. At which day before our lady the " queen at Westminster came as well the said Thomas Stroud 66 by his attorney aforefaid, as the faid defendant in her of proper person; and the said Thomas prays a further day

Repl.

Imparlances for the plaintiff.

to imparle to the aforefaid plea; and it is granted to "him, &c.; and upon this a further day is given to the " faid parties before our lady the queen at Westminster, until Wednesday next after fifteen days from the day of Easter, that is to say, for the said Thomas to imparle to 46 the aforesaid plea, and then to reply, &c. At which Replication by "day, before the lady the queen at Westminster, cometh way of estoppel, 46 as well the faid Thomas Stroud by his attorney aforefaid, that the defendant put in bail as the aforesaid defendant in her proper person: And by the name of " the faid Thomas faith, that the faid Lady Gerrard, other- Eiz. " wife Garret, the person against whom the said Thomas " exhibited the faid bill by the name of Lady Elizabeth "Gerrard, otherwise Garret, to his aforesaid plea ought of not to be admitted to quash the said bill of the said Tho-" mas, because he saith that she the said Lady Gerrard, " otherwise Garret, the person against whom the said "Thomas, in the term of St. Michael last past, exhibited " his faid bill by the name of the Lady Elizabeth Gerrard, " otherwise Garret, in this said term of St. Michael, put "in common bail in court here, at the fuit of the faid " Thomas, in the plea aforefaid, by the name of Lady Elizabeth Garret, as by the record thereof remaining in the " fame court of our faid lady the queen before the queen " herself at Westminster more fully appeareth: And this 46 he is prepared to verify by the faid record: Wherefore 66 he prayeth judgment if the faid Lady Gerrard, otherwise " Garret, the person against whom the same Thomas ex-66 hibited his faid bill by the name of Lady Elizabeth Ger-" rard, otherwife Garret, ought to be admitted to her faid " plea to the quashing of his faid bill against the faid re-" cord, &c. " And the aforesaid Honor Gerrard, against whom the Demurrer.

" aforesaid Thomas exhibited his bill aforesaid by the name " of Lady Elizabeth Gerrard, otherwise Garret, saith, that " the aforesaid plea by the said Thomos in manner and " form aforefaid above in his replication pleaded, and the " matter in the same contained, are not sufficient in law " to compel her the faid Honor to answer the said bill of "him the faid Thomas: To which faid plea she the same " Honor need not, nor is by the law of the land obliged in " any manner to answer: And this she is ready to verify: Wherefore for default of a sufficient replication in this 66 behalf, she the faid Honor, as before, prays judgment of " the faid bill, and that the same bill may be quashed, &c. " And the faid Thomas faith, that the faid plea by the faid Joinder-"Thomas in manner and form aforesaid above in his reef plication pleaded, and the matter therein contained, are 66 good and sufficient in law to compel the said Elizabeth

66 to answer to the aforesaid bill of the said Thomas there-

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"upon against the said Elizabeth: Which said plea, and the matter in the same contained, the said Thomas is prepared to verify and prove, as the Court, &c. And because the said Elizabeth hath not answered, nor hath hitherto in anywise contradicted it, he the same Thomas, as before, prayeth judgment, and that the said Elizabeth be compelled to answer to the aforesaid bill of the said Thomas, &c. But because the Court of our said lady the queen now here are not advised of giving their judgment of and concerning the premises, day therefore is given to the aforesaid parties before our lady the queen at Westminster, until . . . . day next after . . . . . . . of hearing their judgment of and concerning the said premises; for that the Court of our said lady the queen now here is not yet thereof, &c."

Pleas before our Lord the King at Westminster, of the Term of the Hely Trinity in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 763.

### Johnson against Long.

[3 Ld. Raym. Entries 389. S. C.]

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Salk. 10. Carth. Somerset, " B E it remembered, That herctofore, to wit, 455. S. C. to wit. " B in the term of St. Michael last past, be-
              " fore the lord the king at Westminster, came Timethy
              " Johnson by Philip Hodges his attorney, and brought into
             " the court of our faid lord the king then there, his cer-
Declaration for a
nulance.
              " tain bill against John Long, in the custody of the mar-
             " shal, &c., of a plea of trespass upon the case, and there
              46 are pledges of profecuting, to wit, John Doe and Rich-
              " ard Roe, which faid bill followeth in these words, to wit,
[7<sup>1</sup>5]
              " Somerset, to wit, Timothy Johnson complains of John
              " Long, in the custody of the marshal of the Marshalsea
              " of the lord the king that now is, before the king himself
              being, for that, to wit, That whereas the faid Timothy,
              on the twenty-first day of April in the eighth year of the
              " reign of our Lord William the Third now King of Eng-
              " land, &c., and ever after to this time, was possessed and
              66 still is possessed of a certain ancient work-house, situate
              so and being in the parish of Whatley in the county afore-
              " faid, in which work-house on the same twenty-first day
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of April in the eighth year aforesaid, and from time whereof the memory of man is not to the contrary, Possession alleged there was a certain ancient window in the west part of in an old workthe fame work-house, through which a very wholesome was a window si air and a chearing light entered and came in, and used time out of 46 and was accustomed to enter and come in on the same mind. 66 twenty-first day of April in the eighth year aforesaid, 46 and for all the time aforefaid, to the great benefit and 46 advantage of the occupiers of the faid work-house: And whereas the faid John on the first day of April in the eighth year aforesaid, and always afterwards to this 46 time, had been possessed, and doth still remain possessed of a certain parcel of land, with the appurtenances, fi- Defendant's poftuate, lying, and being in the parith of Whatley afore- fession in a piece 66 faid in the county aforefaid, lying contiguous to the thereto. 44 aforesaid work-house, and being so possessed thereof, the " faid John contriving and fraudulently intending many "ways to burthen and oppress the said Timothy, and al-66 together to deprive him the faid Timothy of the air and 66 light which into the work-house aforesaid through the window aforesaid used and was accustomed to enter and " come in, and to stop up the aforesaid work-house with " horrid darkness, and altogether to deprive the said Tiof the use and advantage of the said work-house. on the first day of April in the eighth year aforesaid, at 66 Whatley aforesaid, in the county aforesaid, erected and 66 built anew a certain wall upon the faid parcel of land of •6 the faid John, so near the said work-house, that by the see fame erection of the wall aforefaid, the faid window on st the faid twenty-first day of April, and always after, to 46 the day of exhibiting this bill, to wit, the twenty-third ed day of October in the ninth year of the reign of our faid 66 lord the now king, was very much stopped up and dark. Defendant obened, whereby the fame Timothy totally lost and was deprived of the whole advantage and easement of the said the plaintiff lost window, and the comfort and wholesomness of the air the benefit of his 46 and light which used to enter and come in and upon 66 the faid window as aforefaid, and the whole use and " profit of the faid work-house from the said twenty-first "day of April in the eighth year aforesaid, to the afore-" faid twenty-third day of October in the ninth year afore-46 faid: Wherefore the faid Thomas faith, that he is preju-"diced and damnified to the value of forty pounds: And " thereupon he brings this suit, &c. "And now at this day, to wit, Friday next after the Imparlance, " morrow of the Holy Trinity in this same term, until

which day the said John Long had leave to imparle to the faid bill, and then to answer, &c. before our lord 46 the king at Westminster comes as well the said Timothy " by his attorney aforesaid, as the said John by Jacob Long

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"his attorney, and the faid John defends the force and

Pleads another action and recovery for the fance nuitance in bar-

Setting forth a former declara-

" injury, when, &c. And faith that the faid Timothy ought not to have or maintain his faid action thereupon " against him, because he saith that the aforesaid Timothy " heretofore, to wit, in Easter term in the eighth year of " the reign of our faid lord the king, that now is, in the " court of the faid lord the king, before the king himfelf " here, to wit, at Westminster, in the county of Middlesex, " impleaded the same John Long in a certain plea of tres-66 pass upon the case, declaring against him, That whereas " the same Timothy on the tenth day of Odober in the se-" venth year of the reign of our lord the king that now 44 is, and always afterwards until that time, had been, 44 and then was possessed of a certain ancient work-house, 66 situate and being in the parish of Whatley in the county " aforefaid, and that in that work-house on the same 44 tenth day of October in the seventh year abovesaid, 44 and from time whereof the memory of man was not "then to the contrary, there was a certain ancient win-66 dow in the west part of the said work-house, and that 46 through the fame window the most wholesome air and " light entered and came in on the same tenth day of Oc-" tober in the seventh year aforesaid, and for the whole 66 time abovefaid entered and came in, and was used and " accustomed to enter and come in, to the great bene-66 fit and advantage of the occupiers of the faid work-" house; and that the said John on the said tenth day of " October in the seventh year aforesaid, and always after-66 wards until that time, had been possessed, and then was " possessed of a certain parcel of land with the appurte-" nances, situate, lying, and being in the parish of Wbat-" ley in the county aforesaid, lying contiguously to the " aforesaid work-house; and being so possessed thereof, the " faid John contriving and fraudulently intending many ways to burden and oppress the said Timethy, and alto-" gether deprive him the faid Timothy of the air and light which used and was accustomed to come and enter into 66 the faid work-house through the window aforefaid, and 66 to stop up the work-house aforesaid with terrible dark-" ness, and wholly to deprive the said Timothy of the use " and advantage of the faid work-house, on the faid tenth " day of October in the seventh year asoresaid, at Whatley " aforefaid in the county aforefaid, did newly erect and " build a certain wall upon the faid parcel of land of 44 him the faid John, so near the said work-house that by " the fame erection of the wall aforesaid, the aforesaid "window, on the faid tenth day of Officber, and always " afterwards until the twentieth day of April in the eighth 46 year of the reign of the now king, was very much " stopped up and darkened, whereby the said Timetby to-

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" tally loft and was deprived of the whole advantage and easement of the said window, and the comfort and " wholesomeness of the air and light, which in and 66 through the faid window aforefaid was accustomed to " enter and come in, and the whole use and profit of the 66 faid work-house from the faid tenth day of October in 46 the seventh year aforesaid, unto the said twentieth day of April in the eighth year aforesaid: Wherefore the said "Timothy then faid that he was injured, and had received damage to the value of forty pounds. And thereupon he then brought his fuit, &c. And there were tormer processfuch proceedings thereupon in the same court here, to ings. wit, at Westminster aforesaid, after that the said John had there pleaded thereunto, that he was not thereof guilty, 46 and by a certain jury of the country had been thereof 66 found guilty, That afterwards, to wit, in the term of 66 St. Michael then next following, by the same court "here, it was confidered, that the faid Timothy should recover against the said John fourteen pounds for his damages which he had fustained as well by occasion of 66 the premifes in the fame record mentioned, as for his costs and damages by him about his fuit in that behalf 66 laid out, as by the record thereof remaining in the same 66 court here, to wit, at Westminster aforesaid, more fully Averment of the 46 appears. And the same John further saith, that the 46 aforefaid work-house, window, erection, and building 66 of the wall aforefaid, in the faid recited record mentioned, and the aforefaid work-house, window, erection, 46 and building of the wall aforefaid, in the bill of the faid 66 Timothy against him the said John Long now exhibited and so abovementioned and expressed, are the same work-house, window, erection, and building of the wall, and not other " nor different; and that the aforefaid Timothy in the abovese recited record named plaintiff, and the aforefaid Timothy 44 above in the faid bill named plaintiff, are one and the 66 same person, and not another nor different; and that the aforesaid John in the said recited record named de-fendant, and the aforesaid John in the said bill above " named defendant, are one and the fame person, and not " another nor different: And this he is ready to verify. Whereupon he prays judgment if the aforesaid Timo-" thy ought to have or maintain his said astion against " him, &c.

46 And the faid Timothy faith, that he, notwithstanding Demurrer. " any matter by the faid John above in pleading alleged, " ought not to be precluded from having his faid action "thereupon against him the said John; because he saith, " that the plea aforesaid by the said John in manner and 66 form aforesaid above pleaded, and the matter therein

" contained;

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contained, are not fufficient in the law to preclude the fame Timothy from having his said action thereupon against the said John; to which said plea he the same Timothy hath no necessity, neither by the law of the land is bound in any manner to answer: And this he is ready to verify. Whereupon for default of a sufficient answer in this behalf, the same Timothy prays judgment, and his damages by occasion of the premises aforesaid to be to him adjudged, &c.

Joinder.

"And the aforesaid John saith, that the said plea by him the said John, in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in the law to preclude the said Timothy from having his said action thereupon against him the

from having his faid action thereupon against him the faid John, which said plea, and the matter in the same contained, he the same John is ready to verify and prove as the Court, &c. And because the said Timothy hath not answered to the said plea, nor hitherto any ways contradicted it, he the said John, as before, prays judgment, and that the said Timothy be debarred of hav-

ing his said action against him the said John. But because the Court of the said lord the king now here are
not yet advised of giving their judgment in and concerning the premises, a day is thereupon given to the

so parties aforesaid, before the said lord the king at Westso minster, until Wednessiay next after eight days from the so day of St. Martin, of hearing their judgment therein, so for that the Court of the said lord the king now here is so not yet thereupon, &c. At which day, before the lord

"the king at Westminster, come the said parties by their faid attornies; upon which all and singular the premises being seen, and by the Court of the lord the king now

"here more fully understood, and mature deliberation thereupon had, it seems to the Court of the lord the king here, that the plea aforesaid by said John, in manner and form aforesaid above pleaded, and the matter

66 in the fame contained, are good and sufficient in law to 66 debar the said Timothy from having his said action 66 against the said John. Therefore it is considered, that 66 the said Timothy take nothing by his said bill, but that

"he for his false complaint be thereupon in mercy, &c.,
and that the said John go then without a day, &c.
And it is further considered, that the afcresaid John recover against the said Timothy six pounds and ten shil-

" lings for his costs and charges in and about his defence in this behalf sustained, adjudged by the Court of the faid lord the king now here, to the said John, by his as-

" fent, according to the form of the statute in such case made and provided; and that the asoresaid John have

" execution thereof," &c.

Judgment for

Continuance.

Pleas before our Lord the King and our Lady the Queen at Westminster, of the Term of Easter in the Second Year of the Reign of our Lord William and our Lady Mary, now King and Queen of England. Roll 43.

Payne against Partridge and another,

[3 Ld. Raym. Entries 439. S. C.]

Cambridgesbire, "BE it remembered, That heretofore, 3 Mod. 289. to wit, to wit, in the term of St. Michael 255. Salk. 12. " last past, before our lord the king and our lady the Comb. 180. queen at Westminster, came Isaac Payne, by Humphry Carth. 191.
Holt 6. S. C. 46 Ambler his attorney, and brought into the court of our " faid lord the king and lady the queen, then there, his " certain bill against Edward Partridge, Esq. and William " Boulter, in the custody of the marshal, &c., of a plea of " trespass upon the case; and there are pledges of prose-" cuting, to wit, John Doe and Richard Roe, which faid \* bill followeth in these words, that is to say, Cambridge-" fbire, to wit, Isaac Payne complains of Edward Par- Declaration by " tridge, Esq. and William Boulter, in the custody of the an inhibitant of marshal of the Marsbalfea of our lord the king and lady the proprieturs the queen, before the faid king and queen being, for of a ferry-boat that, to wit, that whereas the village of Littleport with- for not keeping in the isle of Ely in the county aforesaid, is, and from it in repair. " all the time whereof the memory of man is not to the contrary, was an ancient village, and whereas within 44 the faid village of Littleport aforesaid there is, and for 44 all the faid time was, an ancient river called Wilney riso ver, and upon the same river, and across the same from " the whole time abovefaid, there was an ancient passage [or ferry] at the north-east side of the same village of Prescription in a Littleport, near the end of a lane called Ferry-lane, ferry and toll for passage. " leading from the village of Littleport aforesaid to the " faid river, for the passing and carrying over of the sub-" jects of this realm of England, defiring to pass over and 66 beyond the faid river, to wit, from a certain place called the Ferry-lane, from the north-east part thereof to a " certain place called Adventurous Bank from the northeast part of the same river overthwart that river, either 66 forward or backward, at their will, for the passing over 44 and transporting of their horses, mares, and geldings, " which faid passing over and transporting from the whole " time abovefaid until of late, to wit, the first day of May

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" in the fifteenth year of our lord Charles the Second, late "King of England, &c., were had and performed in a ef ferry-boat there kept by the proprietors and occupiers " of the faid pailage [or ferry]; and the proprietors, oc-" cupiers, and keepers of the faid passage [or ferry] and 66 ferry-boat for the time being, for the better keeping and " maintaining the fame, from the whole time aforefaid, "took, and were accustomed to take, of the said subjects " of this realm of England, so to be passed and transported over and beyond the faid river, to wit, from the afore-

Exception of in- " called Adventurous Bank, across the said river, (other habitants in ancient messuages from paying toll.

taken,

" than of the inhabitants of the same village of Littleport, " refiding in ancient meffuages or ancient cottages there,) " certain reasonable rates, as toll or custom, to wit, one The several tolls " halfpenny for every horse and man thereupon riding, and

66 faid place called the Ferry-lane to the aforefaid place

" for every led horse, mare, or gelding, one farthing; and "for every horse, mare, or gelding, otherwise loaded, one

46 penny for fuch passing and transporting of them as " aforefaid, to be received every time of their passing over "beyond the river aforesaid, at the passage [or ferry]

Prescription of inhabitants in the ancient meffugges and cottages for free

pallage.

" aforesaid, either forward or backward: And whereas exemption for the se also within the same village of Littleport there is, and " from the whole time aforesaid, whereof the memory of

" man is not to the contrary, there was fuch an ancient " custom, to wit, that the inhabitants of that village in " ancient messuages or ancient cottages there residing, had 46 and might have, and from the whole time aforesaid were

" accustomed to have, liberty of passing over the said ri-" ver at the aforesaid passage there, for themselves, their

" horses, mares, and geldings in the ferry-boat aforesaid, " fo as aforefaid to be transported either forward or back-

" ward, at their pleasure, without any payment whatso-" ever for such their passing over so to be had: And "whereas also the said Isaac, on the first day of May in

That the plain.

tiff is an inhabi- 66 the second year of the reign of our lord James the Setant in an ancient " cond, late king of England, and long before and from " thence afterwards to this time was, and still remains

one of the inhabitants of the aforefaid village of Little-" port, and then and still residing in a certain ancient 66 messuage there, and for that cause and reason he the

66 faid Isaac, by virtue of the faid custom, had and hath a " right, and ought to have the liberty of passing over the

" faid river at the paffage aforefaid, in the ferry-bont se aforefaid, for himfelf, his horfes, mares, and geldings in

66 form aforefaid, without any payment whatfoever for " the same to be made. Nevertheless the said Edward

keeping the boat. " and William not being ignorant of the faid custom, but " contriving and maliciously intending him the faid Isaac

Breach in not

" illegally

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se illegally to burden and greatly to damnify, and to deso prive him of the liberty of his aforefaid passing over 46 the faid river to be had at the passage aforesaid in the faid ferry-boat as aforefaid, and also to cause him the so faid Isaac entirely to lose the same, on the said first se day of May in the second year abovesaid, and from thence to the day of exhibiting the faid bill of the faid 46 Isaac (the same Edward and William, then and before 46 and afterwards to this time being proprietors, occuso piers, and keepers of the passage [or ferry] and ferryboat aforesaid) had or preserved, or kept no ferry-boat 46 at the faid passage [or ferry] for the passing over of the 46 subjects of this realm, and their horses, mares, and " geldings aforefaid, willing to pass over and beyond the faid river, but have for the time aforefaid totally omit-46 ted and neglected to do, have, preserve, or keep the 6 fame, and no ferry-boat for the time aforefaid, or any 46 part of that time, was or yet is, although the faid Edward and William, on the faid first day of May in the see fecond year abovefaid, and often afterwards, at Littlefor port aforesaid, were requested by the said Isaac to have 46 fuch ferry-boat at the passage aforesaid, and to permit "him the faid Isaac to enjoy his said liberty there; so 56 that the faid Isaac from the aforesaid first day of May 56 in the second year abovefaid, and from thence to this 46 time was, and yet is hindered and wholly deprived of 66 his liberty of passing over the river aforesaid at the said 46 paffage in form aforefaid, according to the custom 46 aforefaid to be had, contrary to the faid custom, and to the damage of him the faid Isaac of five hundred " pounds. And thereupon he brings this suit, &c.

"And now at this day, to wit, Wednesday next after fif- Imparlance. teen days from the day of Easter in this same term, to which day the faid Edward and William had leave to imparl to the faid bill and then to answer, &c. before "the lord the king and lady the queen at Westminster, cometh as well the said Isaac by his said attorney, as the " faid Edward and William by Joseph Sherwood their at-torney; and the faid Edward and William defend the " force and injury, when, &c., and fay that the aforefaid 16 Isage ought not to have or maintain his action afore-" faid thereupon against them; because protesting that Protestation that 66 the passing and carrying of persons, horses, mares, and the fassage was 46 geldings, over and across the said river, were not had or done in any ferry-boat kept for the passing over and

" transportation of persons or cattle in the place where, 44 and in manner and form as by the declaration aforesaid

A 2 4



" is above supposed: and protesting that within the said Further protestavillage of Littleport there is not, nor ever was any fuch tion that there is " custom

custom as in the declaration aforesaid is above supposed

protestation also, was not an inhabitant in any old messuage.

built a bridge instead of a boat, and keep it in for passage than the boat.

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For which res-

Reply, that he was not permitted to pais over any bridge.

and alleged; and protesting also that the aforesaid Isaac that the plaintiff " is not, nor ever was one of the inhabitants of the faid " village of Littleport, reliding in any ancient melluage 46 there in manner and form as by the aforefaid declara-"tion is above supposed, the said Edward and William " for plea fay, that long before the faid time in which, Plea that at their 66 &c. to wit, on the first day of May in the fifteenth year own charge they 66 of the reign of the faid late king Charles the Second " aforefaid, he the faid Edward, at his own proper cofts " and charges, erected, built, and placed, in and upon the repair, more fase se said river and overthwart the same river at the passage " aforesaid, a certain bridge made of wood and stones for "the use, easement of passing over, and transporting of 44 all and fingular the persons, horses, mares, and geldings " there coming and willing to pass over and beyond the " faid river at the passage aforesaid, which said bridge " there so erected and placed the same Edward there " from time to time, and at all times after the making "thereof to this time, hath well and sufficiently had, pre-" ferved, and maintained, repaired and kept, and still " hath, preserveth, maintaineth, and keepeth there, so that " the faid Isaac and all and singular the persons, horses, " mares, and geldings there coming and willing to pals over and beyond the faid river at the passage aforesaid, 66 from time to time and at all times after the making 44 and placing of the aforesaid bridge there unto this time, " might and still may there go, return, and pass upon, by " and over the faid bridge across and beyond the river " aforefaid, at the paffage aforefaid, without any danger, " and more fafely, better and fooner, than in a ferry-66 boat: For which reason the said Edward and William son they omitted so had preserved or kept no ferry-boat at the said passage, to keep the boat. 66 but have omitted and neglected to do, have, preserve, 66 or keep the fame, as they well might, for the cause " aforefaid: And this they are prepared to verify. Where-66 fore they pray judgment if the faid Isaac ought to have " or maintain his action aforefaid thereupon against " them, &c. " any thing by the faid Edward and William above al-" leged, ought not to be precluded from having his faid " action thereupon against them, because he saith, that he

" And the said Isaac saith, that he, notwithstanding "the faid Isaac was not permitted to have the liberty of 46 the paffage aforefuld, by any bridge over and beyond the river aforesaid, according to the custom in the dese claration before-mentioned, against the custom afore-66 said: And this he is ready to verify. Wherefore he prays judgment and his damages by occasion of the

" premises to him to be adjudged, &c.

" And

And the faid Edward and William fay, That the faid Demuner. of plea by the faid Isaac in manner aforesaid above in his ef replication pleaded, and the matter in the same con-" tained, are not sufficient in the law to have and mainstain the aforesaid action of him the said Isaac against 44 them the faid Edward and William, to which the faid Edward and William need not, nor are by the law of the land in any manner bound to answer: And this "they are ready to verify. Wherefore, for default of a se sufficient replication in this behalf, the same Edward s and William as before pray judgment, and that the 46 faid Isaac be precluded from having his said action " against them the said Edward and William, &c. "And the faid Isaac faith, That the aforesaid plea by Joinder.

"the same Isaac in manner and form aforesaid above in " his replication pleaded, and the matter in the same " contained, are good and fufficient in the law to have " and maintain the action of the faid Haac against them " the faid Edward and William; which faid plea and the 46 matter therein contained the same Isaac is ready to 46 verify and prove, as the Court, &c. And because the aforesaid Edward and William have not answered the " faid plea, nor have hitherto any ways denied the fame, "he the faid Isaac, as before, prays judgment and his da-66 mages by occasion of the premises to be adjudged to

" him, &c.

" But because the Court of the said lord the king and " lady the queen now here are not yet advised of giving Contin 66 their judgment of and concerning the premises, a day "therefore is given to the faid parties before the lord the "king and the lady the queen, at Westminster, until Fri-46 day next after the morrow of the Holy Trinity, of hear-" ing their judgment of and concerning the faid pre-" mises; for that the Court of the said lord the king and " lady the queen now here thereof, are not yet, &c. At which day, before the lord the king and lady the queen 44 at Westminster, come the said parties by their said at-66 tornies. But because the Court of our lord the king so and lady the queen are not yet advised of giving their 66 judgment of and concerning the premises, a day there-46 fore is given to the faid parties before our lord the king " and lady the queen at Westminster, until Thursday next after three weeks from the day of St. Michael, of hear-44 ing their judgment thereupon, for that the Court of 66 our faid lord and lady the now king and queen are not . " yet thereof, &c. At which day, before the lord the "king and lady the queen at Westminster, come the parst ties aforesaid by their said attornies. But because the "Court of the faid lord the king and lady the queen now

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"here are not yet advised of giving their judgment of " and concerning the premises, a day therefore is given to the faid parties before our lord the king and lady the " queen at Westminster, until Friday next after eight days from the day of St. Hilary, of hearing their judgment, 66 for that the Court of the faid lord the king and lady "the queen now here are not yet thereupon, &c. At 46 which day, before the lord the king and lady the queen " at Westminster, come the aforesaid parties by their said 44 attornies: But because the Court of the said lord the 66 king and lady the queen, now here, are not yet advised of giving their judgment of and concerning the pre-" miles, a day therefore is given to the faid parties " before the lord the king and lady the queen at Weffminster, until Wednesday next after fifteen days from 66 the day of Easter, of hearing their judgment there-" upon, for that the Court of the faid lord the king and " lady the queen now here are not yet thereupon, &c. 46 At which day, before the lord the king and lady the "queen at Westminster, come the aforesaid parties, by their faid attornies: But because the Court of the said 46 lord the king and lady the queen now here are not yet 46 advised of giving their judgment of and concerning the es premises, a day therefore is given to the said parties " before the lord the king and lady the queen at West-" minster, until Saturday next after eight days from the " day of the Holy Trinits, of hearing their judgment "thereupon, for that the Court of the faid lord the king 44 and lady the queen now here are not yet thereupon, " &c. At which day, before the lord the king and lady 46 the queen at Westminster, come the said parties by their 46 attornies aforesaid; upon which all and fingular the of premifes being feen and more fully understood by the "Court of the faid lord the king and lady the queen " now here, and mature deliberation being thereupon 46 had, it feems to the Court of the faid lord the king and " lady the queen now here, that the aforesaid plea by "the aforesaid Isaac, in manner and form aforesaid above 66 in his replication pleaded, and the matter in the fame contained, are not sufficient in the law to have and " maintain the faid action of him the faid Isaac, against "the faid Edward and William: Therefore it is consi-46 dered, that the faid Isaac take nothing by his faid bill, 66 but that for his false complaint he be thereupon in " mercy, &c. and that the aforesaid Edward and William " go hence without a day," &c.

Judgment for defendant.
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Pleas before our Lord the King at Westminster, of the Term of St. Hilary in the Seventh Year of the Reign of our Lord William the Third, now King of England, &c. Roll 697.

### Hicks against Dowling.

[3 Ld. Raym. Entries 354. S. C.]

Somerfet, " B E it remembered, That heretofore, to wit, Salk. 13. Cafes to wit, " B in the term of St. Michael last past, before B.R. 100. S.C. so our lord the king at Westminster, came Sarah Hicks wi-46 dow, by Thomas Callow her attorney, and brought into " the court of our faid lord the king then and there, his " certain bill against John Dowling, in the custody of the marshal, &c., of a plea of trespass upon the case; and " there are pledges of profecuting, to wit, John Dee and "Richard Roe; which faid bill followeth in these words, 46 that is to fay, Somerfet, to wit, Sarah Hicks widow com- Declaration that " plains of John Dowling, in the custody of the marshal she was lawfully of the Marsbalfea of our lord the king, before the king meffuage for a 66 himself being, for that, to wit, That whereas the said term of years, "Sarah, on the twenty-fixth day of January in the year and demifed it of our Lord one thousand fix hundred and ninety-two. of our Lord one thousand six hundred and ninety-two, the defendant, if was lawfully possessed of and in a certain messuage, si- such persons "tuate, lying, and being in East Dundry, in the county should so long " aforesaid, for a certain term of years then and yet to se come and unexpired; and being so thereof possessed, " the same Sarah on the same day and year abovesaid, at 45 East Dundry aforesaid, demised the said messuage " (among others) to the aforesaid John Dowling, to have 44 and to hold to the same John Dowling, from the twenty-[725] " fifth day of March then next following, for the term "of three years, if the said Sarah Hicks and John Dowling; and one Thomas Dowling and Edith, the sather
and mother of him the said John Dowling, should so
long live; by virtue of which said demise, the aforesaid Desendant's en-" John Dowling afterwards, to wit, on the twenty-fixth try and possesday of March in the year of our Lord one thousand fix fion for his term, the reversion be-" hundred and ninety-three, entered into the messuage longing to the " aforefaid, and thereof (among others) was possessed for plaintiff. "the faid term of three years above to him demised, the " reversion thereof belonging to the same Sarah, for the " refidue of the faid term first above mentioned: And the Averment of " faid Sarah in fact faith, that as well the faid Thomas lives. " Dowling and Edith, as the aforesaid John Dowling, are

Breach in negligent keeping his fire.

" yet in being and in full life, to wit, at East Dundry aforesaid: Nevertheless the aforesaid John Dowling, sufficiently knowing the premises, but contriving and maliciously intending in this part very much to damnify and burthen the said Sarah, he the said John Dowling, on the twentieth day of June in the year of our Lord one thousand six hundred and ninety-sive, (being so as aforesaid possessed of the messuage abovesaid, and the reversion thereof belonging to the said Sarah in manner before said,) did so negligently and improvidently keep his sire in the messuage aforesaid, that by reason thereof the same messuage was then burnt and is totally destroyed: Whereupon the said Sarah saith, that she is injured, and hath damage to the value of sive hundred pounds: And therefore she brings this suit, &c.

Imparlance.

"And now at this day, to wit, Thursday next after eight days from the day of St. Hilary in this same term, until which day the said John had leave to impart to the said bill, and then to answer, &c. before our lord the king at Westminster, comes as well the said Sarah by her attorney aforesaid, as the said John by Samuel Brewster his attorney: And the same John Dowling desends the force and injury, when, &c., and saith that he is not thereof guilty; and of this he puts himself upon the country; and the aforesaid Sarah doth likewise, &c. Therefore let a jury come thereupon before the lord the king at Westminster, on Wednesday next after eight days from the day of the purification of the blessed Mary, and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the said parties there."

Not guilty.

IJc.

[726] Pleas before our Lord the King at Westminster, of the Term of the Holy Trinity in the Ninth Year of the Reign of our Lord William the Third, now King of England, Sc. Roll 359.

Turbervile against Stampe.

[3 Ld. Raym. Entries 375. S. C.]

Saik. 13, 647. Dorset, "BE it remembered, That heretofore, to wit, Comb. 459. to wit, "BE in the term of Easter last past, before our Skin. 681. Cases "lord the king at Westminster, came Thomas Turbervile the

## Pleadings to the Cales.

the younger, Esq. by Edward Lawrence his attorney, B. R. 151. Holt and brought into the Court of our faid lord the king " then there, his certain bill against John Stampe, Gentle-" man, in the custody of the marshal, &c., of a plea of "trespass upon the case; and there are pledges of prose-46 cuting, to wit, John Doe and Richard Roe; which faid 66 bill followeth in these words, that is to say, Dorset, to " wit, Thomas Turbervile the younger, Esq. complains of 44 John Stampe, Gent. in the custody of the marshal of the " Marsbalsea of our lord the king, before the king him-" felf being; for that, to wit, That whereas, according to Declaration upon "the law and cultom of this realm of England hitherto the custom of 46 used and approved, every man of the same realm is negligently 66 obliged to keep his fire fafe and secure by day and by keeping a fire in 46 night, left for want of the due keeping of such fire any the defendant's close, whereby 46 damage in any manner happen to any person of the the plaintiff's fame realm; and whereas the aforefaid Thomas, on the heath and furses fixth day of April in the ninth year of the reign of our were burnt. " lord William the Third, now King of England, &c., 44 was poffested of a certain close of heath lying and being 44 in the parish of Stoke in the county aforesaid: And whereas also the said John, on the day and year above-66 said, was in like manner possessed of a certain other close " of heath, next adjoining to the faid close of heath of "him the faid Thomas, in the parish and county aforesaid, 44 the faid 'fobn, on the day, year, and place abovesaid, so 66 negligently and improvidently kept his fire in the faid "ciose of heath of him the said John, that for default of 44 the due keeping of the faid fire, the heath and furzes of the faid Thomas, to the value of forty pounds, in the faid close of heath of him the said Thomas then growing " and being, were burnt, to the great damage of the faid 46 Thomas, and contrary to the custom aforesaid: Where-" fore he faith that he is injured and hath damage to the 46 value of forty pounds: And thereupon he brings this " fuit, &c. " And now at this day, to wit, Friday next after the

" faid bill, and then to answer, &c. before the lord the si king at Westminster, comes as well the said Thomas by "his faid attorney, as the faid John by Samuel Brewster his attorney: And the faid John defends the force and "injury, when, &c., and faith that he is not thereof 66 guilty; and of this he puts himself upon the country; " and the said Thomas likewise, &c. Therefore let a jury 46 thereupon come before the lord the king at Westminster,

"morrow of the Holy Trinity in this same term, until Not guilty, and 45 which day the faid John had leave to imparle to the iffue.

on - day next after -; and who neither, &c. Venire awarded.

"to recognize, &c. because as well, &c. The same day
"is given to the said parties there, &c.

Nifi prius.

"Afterwards process being thereupon continued between the said parties of the aforesaid plea, by the jury's
being respited there between them thereupon, before
our lord the king at Westminster, until Saturday next
after three weeks from the day of Saint Michael, unless
the justices of our lord the king assigned to take the assizes in the county of Dorset, on Thursday the twentysecond day of July, at Dorsebster in the county aforesaid,
by the form of the statute, &c., should first come for desault of jurors, &c. At which day, before the lord the
king at Westminster, cometh the said Thomas Turbervile
the younger, by his said attorney, and the said justices
before whom, &c. have sent hither their record before
them, had in these words, to wit. Afterwards on the day

Poftes and ver-

the younger, by his faid attorney, and the faid justices before whom, &c. have fent hither their record before them, had in these words, to wit, Asterwards on the day and place within contained, before Sir Edward Ward, Knt. chief baronof the Exchequer of the lord the king, and Sir Thomas Rokeby, Knt. one of the justices of the lord the king assigned to hold pleas before the king himself, justices of our said lord the king assigned to take assigned in the county of Dorset, by the form of the statute, &c. came the within-named Thomas Turbervile the younger, Esq. by his attorney within mentioned, and the within-written John Stampe, Gent. although solemnly required, did not come, but made default: Therefore let the jury, whereof mention is made, be taken against him

Defendant's de-

46 Esq. by his attorney within mentioned, and the within-" written John Stampe, Gent. although solemnly required, 46 did not come, but made default: Therefore let the " jury, whereof mention is made, be taken against him 66 by default, and the jurors of that jury being summoned, 66 fome of them, to wit, Thomas Notting, Henry Kelloway, " Richard Hambourne, John Ford, David Hayward, Mark Dowland, Henry Humber, James Squib, Robert Wool-66 frays, came and are fworn into that jury; and because so the rest of the jurors of the same jury did not appear, st therefore other persons then present being chosen for 66 this purpose are appointed a-new by the sheriff of the county aforesaid, at the request of the aforesaid Thomas 46 Turbervile, and by the mandate of the aforesaid jusctices, whose names are affiled in the panel within writse ten, according to the form of the statute in such case " lately made and provided: And a jury being appointed 4 2-new, namely John Warren, William Buffel, and Nathaniel Payne, summoned in like manner, come, and to-" gether with the other jurors aforesaid first for this pur-" pose impanelled and sworn, being chosen, elected, tried, and fworn to speak the truth touching the within con-

tents, upon their oath fay, that the aforesaid John Stampe is guilty of the within-written premises within laid to

[728] Verdict for plaintiff.

" his charge, as the faid Thomas Turbervile thereupon "within

# Pleadings to the Cales.

within complaineth against him, and affels the damages of him the faid Thomas, by the occasion within written; " besides his costs and charges by him concerning his suit in this behalf applied, to eighty pounds, and for the faid costs and charges to forty shillings: Therefore it is con- Judgment. se sidered, that the said Thomas Turbervile do recover 44 against the aforesaid John Stampe his said damages by 44 the faid jury in form aforefaid affessed, and also eleven connected the pounds of his costs and charges for the increase, ad- Increase of da-44 judged by the Court of the faid lord the king now here mages. 46 to the same Thomas Turbervile by his assent, which said

damages in the whole amount to thirty-one pounds; " and the faid John, in mercy," &c.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. 162.

Robins against Robins.

[3 Ld. Raym. Entries 446. S. C.]

Cornwal, "BE it remembered, That heretofore, to Salk. 15. Cafes to wit, "BE it remembered, That heretofore, to Salk. 15. Cafes to wit, in the term of Eafter last past, before B. R. 273. S.C. Cafe for arreling our lord the king at Westminster, came Stephen Robins, a man by colons 66 Gentleman, by Edward Hoblyn his attorney, and brought of process and certain bill against John Robins, Gentleman, in the cuf-was required by tody of the marshal, &c., of a plea of debt; and there law, after tender-" are pledges of profecuting, that is to fay, John Doe and ing a common " Richard Roe; which faid bill followeth in these words, to wit, Cornwal, to wit, Stephens Robins, Gentleman, com-" plains of John Robins, Gentleman, in the custody of the " marshal of the Marshalsea of our lord the king, before " the king himself being, for that, to wit, That whereas "the faid John never had any lawful cause of action 46 against the same Stephen, so that by the law of this realm of England the body of the faid Stephen ought for the " same to be taken, and in prison detained until the said 66 Stephen should find sufficient bail to answer the said " John in the same cause: Nevertheless the said John "knowing the premises, but contriving and maliciously " intending him the faid Stephen in this behalf illegally to " burthen,

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66 burthen, oppress, and damnify, and to injure and lesses 66 his credit and reputation as much as in him was, he the si faid John, on the twenty-eighth day of May in the " ninth year of the reign of our lord William the Third, " now King of England, &c., at Bodmyn in the county " aforesaid, caused the same Stephen, by pretence and co-" lour of a certain process in the law, to be arrested; 46 and although he the aforesaid Stephen was always ready to appear upon fuch process at the day of the return 46 thereof to answer the said John according to the exi-" gency of the same process; yet the said John maliciously or procured and caused the same Stephen, on the day and " year aforesaid, at Bodmyn aforesaid, to be imprisoned, and there in prison to be detained by the space of six 66 months, for that only that the aforesaid Stephen could 46 not find sufficient bail to answer the said John upon the 66 faid process; by which the faid Stephen was forced to expend great fums of money for his sustenance in prison 46 aforesaid; and the necessary business of the said Stephen "for that time remained undone, and the same Stephen 44 in his manner of living was greatly injured, to the great 66 disturbance of his mind, and the manifest detriment of " his fame and credit: Wherefore the faid Stephen faith "that he is injured and hath damage to the value of one 46 hundred and fifty pounds: And therefore he brings " fuit, &c.

Mot guilty pleaded. "And now at this day, to wit, Friday next after the morrow of the Holy Trinity in this same term, until which day the said Stephen had leave of imparling to the aforesaid bill, and then to answer, &c. before the lord the king at Westminster, cometh as well the aforesaid Stephen by his said attorney, as the aforesaid John by Joseph Sherwood his attorney; and the said John desends the force and injury, when, &c., and saith that he is not thereof guilty; and of this he puts himself upon the country; and the said Stephen thereupon likewise, &c. Therefore let a jury come thereupon before the lord the king at Westminster, on Wednesday next after three weeks from the day of the Holy Trinity, and who neither, &c. to recognize, &c., because as well, &c. The same day is given to the said parties there, &c.

Pleas before our Lord the King at Westminster, of the Term of St. Hilary in the Ninth Year of the Reign of our Lord William the Third now King of England, &c. Roll 417.

Iveson against Moore and others.

[3 Ld. Raym. Entries 436. S. C.]

York/hire, "BE it remembered that heretofore, to wit, Salk. 15. Comb. to wit, "BE in the term of St. Michael last past, be-430. Carth. 451. Cases B. R. 262. of fore the lord the king at Westminster, came Henry Ive- Holt 10. S. C. 66 fon by Edmund Barker his attorney, and brought into " the court of our faid lord the king then there his certain " bill against John Moore, Esq. and Ruth his wife, Samuel Wright, Jeremiah Lobley, Henry Smith, and Peter Bla-" key, in the custody of the marshal, &c., of a plea of " trespass upon the case; and there are pledges of prose- Declaration, set-" cuting, namely, John Doe and Richard Roe; which faid ting forth, that bill followeth in these words, that is to say, Yorksbire, he was possessed to wit, Henry Iveson complains of John Moore, Esq. and of years in a col-\*\* Ruth his wife, Samuel Wright, Jeremiah Lobley, Henry liery adjoining to Smith, and Peter Blakey, in the custody of the marshal " of the Marsbalsea of our lord the king, before the king 44 himself being, for that, to wit, that whereas the said 46 Henry Ivefon, on the fourteenth day of May in the ninth 46 year of the reign of our lord William the Third, now King of England, &c., and long before and always afterwards, until this time, was possessed and still is pos-66 fessed, for a certain term of years then and yet to come 46 and unexpired, of and in a certain colliery and mine of 66 coals, being under the ground and land, and in the bowels of a certain close or land, situate and lying in the parish of Whitkirke, otherwise Whitchurch, in the county 4 aforesaid, called Whitkirke, otherwise Whitchurch-fields, " and near adjacent to the king's common highway in the 55 parish aforesaid, leading on the north part from the vil-46 lage of Wetherby in the county aforesaid, in, by, and over a certain moor there called Winmore, and from thence in, by, and through a certain lane there called 46 Anlisbaw Lane, and from thence in, by, and through the " village of Whitkirke, otherwise Whitchurch aforesaid, 44 and so back again, and also of and in a certain other " colliery and mine of coals being under the ground and 66 land, and in the bowels of a certain close of moor or parcel of land, in the parish aforesaid, called Halton Vol. II. ВЬ

# Pleadings to the Cales.

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" Moor, fituate and lying, and likewise near adjacent to " the king's common highway aforefaid, leading on the of north part from the village of Wetherby aforesaid, in, 46 by, and over the faid Winnore moor, and from thence 66 in, by, and through the lane aforesaid, called Anlishow "Lane, and from thence in, by, and through the village 66 of Halton in the county aforefaid, and so back again, in, " by, and through which faid lane called Anlisbaw Lane, "the coals got and dug out of the mine aforefaid were wont and intended to be carried and conveyed, as mat-

And had great quantities of

coals ready dug

Aop up the way.

for tale.

46 tets fell out, from the closes aforesaid, to the places 46 neighbouring and adjacent: And whereas also on the " fame fourteenth day of May, the aforesaid Henry Iveson " had a great quantity, to wit, two hundred cart-loads of " coals dug out of the mine aforesaid, severally ready to

66 be exposed to fale in the closes aforesaid, they the said "John, Ruth, Samuel, Jeremiah, Henry Smith, and Peter, being not ignorant of the premises, but contriving and " fraudulently and maliciously intending to hinder, de-

" ceive, and defraud the same Henry Iveson of the use and 46 benefit of his coals aforefaid, and to alienate and seduce 66 the buyers of the coals dug out of the colliery aforesaid 46 from the faid colliery, and to appropriate and procure "them to the colliery of the said John Moore near adjacent

But the defendants maliciously intending to hinder buyers, did

in the parish aforesaid, afterwards, to wit, the aforesaid " fourteenth day of May in the ninth year of the reign of " our faid lord the now king abovefaid, did lay and place " four cart-loads of great stones, and one root of a great " ash in the said way in the lane aforesaid, at the parish

46 aforefaid, and continued and permitted the stones and " root of the ash aforesaid there to remain for the space of " one month, by which faid stones, and the root of the " ash aforesaid, the aforesaid way, in, by, and through

66 the lane aforefaid, was so much stopped up and ob-" ftructed, that the carts and carriages for the carrying 46 and conveying of the coals gotten and dug out of the colliery and mine aforefaid, could not pass in, by, and

"through the faid way, by the lane aforefaid; by which "the fame Henry Ivefon totally lost the benefit, profit, and fale of his coals. 66 advantage of his faid colliery for the whole time afore-

" faid; and the coals gotten from the colliery aforesaid, 66 for want of buyers, so hindered and obstructed for the " reasons aforesaid, became greatly damaged and depre-" ciated, to the damage of the faid Henry of fifty pounds:

" And therefore he brings suit, &c.

imparlance,

Whereby the

p'aintiff loft the

"And now at this day, to wit, Monday next after eight days from the day of St. Hilary in this same term, until "which day the aforesaid John Moore and Ruth his wife, " Samuel, Jeremiah, Henry Smith, and Peter, had leave of

" imparling

imparling to the faid bill, and then to answer, &c. beso fore the lord the king at Westminster, comes as well the s said Henry Iveson by his said attorney, as the aforesaid " John Moore and Ruth his wife, Samuel, Jeremiah, Henry 56 Smith, and Peter, by Michael Johnson their attorney: And the same John Moore and Ruth, Samuel, Jeremiah, " Henry Smith, and Peter, defend the force and injury, when, &c. and fay that they are not guilty of the pre- Not guilty miles above laid to their charge in manner and form as pleaded. 44 the aforefaid Henry Ivefon above complains against "them: And of this they put themselves upon the country; and the aforesaid Henry Iveson likewise, &c. "Therefore let a jury come thereupon before the lord the king at Westminster, on Saturday next after the morrow of se the Purification of the Bleffed Virgin Mary; and who re neither, &c. to recognize, &c. because as well, &c. "The same day is given to the said parties there," &c.

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Pleas before the Lord the King at Westminster, of the Term of St. Michael in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. 125.

## Butcher against Andrews.

Essex, "BE it remembered, That heretofore, to wit, Salk. 23. Carth. to wit, "Bi in the term of Easter last past, before the 446. Comb. 17. Comb. 18. Comb. 1 16 lord the king at Westminster, came Thomas Butcher by Holt 606. S. C. Ralph Cole his attorney, and brought into the court of the said lord the king then there his certain bill against " James Andrews, in custody of the marshal of the Mar-ో Jbalfea, ఆ c. of a plea of trespass upon the case ; and there "are pledges of profecuting, namely, John Doe' and "Richard Roe; which faid bill followeth in these words, Declares in conthat is to say, Efex, to wit, Thomas Butcher complains used the would lend the of James Andrews in the custody of the marshal of the defendant's son Marsbalsea of our lord the king, before the king being, a sum not exfor that to wit, That whereas the aforesaid James on the trush him for first day of August in the eighth year of the reign of goods of that va-"our lord William the Third, now king of England, &c. lue, he would at Gestingthorpe in the county aforesaid, in consideration pay. "that the same Thomas Butcher, at the special instance " and request of him the said James, would lend and ac-66 commodate to one George Andrews, fon of the faid B b 2 " James

46 James Andrews, any fum or fums of money, and

" would fell and deliver to the fame George fuch goods, wares, and merchandize, as he the same George should " want and require, and would trust the said George for "the same, so that the said sums of money so as aforesaid 66 to be lent, and the value of the faid goods, wares, and " merchandizes to the faid George Andrews by the afore-46 faid Thomas Butcher to be delivered and fold, should not " in the whole exceed the fum of five pounds of lawful es money of England, took upon himself, and then and "there faithfully promifed the same Thomas Butcher, that 66 he the aforesaid James would well and truly pay and 66 fatisfy to the faid Thomas Butcher not only all fuch fums 66 of money so to be lent and accommodated by him the 66 faid Thamas Butcher to the faid George Andrews, but also " all fuch fums of money as the goods, wares and merchandizes aforesaid at the time of the sale and delivery 66 thereof should be reasonably worth, when he afterwards should be requested: And the said Thomas 66 Butcher in fact faith, that he the fame Thomas Butcher afterwards, to wit, on the same first day of August in the " eighth year abovesaid, at Gestingthorpe aforesaid, in the county aforesaid, at the said special instance of him the see faid James, did lend and accommodate to the faid George 46 Andrews the sum of thirty shillings of lawful money of England, and on the same day, year, and place last abovesaid, at the aforesaid special instance and request of him the faid James, fold and delivered to the fame George Andrews divers goods, wares, and merchandizes, 46 and trusted the aforesaid George for the same; and that " the goods, wares, and merchandizes aforefaid, at the 66 time of the felling and delivery thereof, were reason-46 ably worth the fum of three pounds and ten shillings of " like lawful money of England, to wit, at Gestingthorpe so aforesaid, in the county aforesaid, whereof the said James s afterwards, that is to fay, on the same first day of August " in the year abovefaid, at Gestingthorpe aforcsaid, in the county aforesaid, then and there had notice by the same Indeb. affumplit " Thomas Butcher: And whereas also the faid James af-" terwards, to wit, on the same first day of August in the " eighth year abovefaid, at Gestingthorpe aforesaid, in the county aforesaid, was indebted to the same Thomas "Butcher in five pounds of like lawful money of Eng-" land, for such sum of money of him the said Tho-" mas Butcher, by the aforesaid Thomas Butcher, at the sum fit for other 66 like special instance and request of him the said James,

> "accommodated; and also was indebted to the same "Thomas Butcher in other five pounds of like lawful mo-

Averment.

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for 51. lent the fon at the plaintiff 's request.

51. laid out, &c. .. to the same George Andrews before that time lent and

ney of England, for divers goods, wares, and merchandizes by the faid Thomas Butcher to the aforefaid George "Andrews, at the like special instance and request of the 66 same James, before that time sold and delivered; and " the faid James being so indebted to the faid Thomas 66 Butcher, he the said James, in consideration thereof, af-66 terwards, to wit, on the same first day of August in the eighth year aforesaid, at Gestingthorpe aforesaid, in the 66 county aforefaid, took upon himself, and then and there in like manner lawfully promifed that he the faid James would well and faithfully pay and fatisfy the aforefaid 66 several sums of five pounds, and five pounds last men-46 tioned, to the same Thomas Butcher, when afterwards he 66 should be thereunto requested. And whereas also the 66 said James afterwards, to wit, on the same first day of " August in the eighth year abovesaid, at Gestingthorpe so aforesaid, in the county aforesaid, was indebted to the " same Thomas Butcher in other five pounds of like lawful es money of England, for so much money of him the said "Thomas Butcher, by the same Thomas Butcher, at the like 66 special instance and request of the said James, for the 66 same James before that time expended and laid out; and he the said James being thereupon so indebted to 44 the same Thomas Butcher, he the said James, in consi-46 deration thereof, afterwards, to wit, the same day and 46 year last abovesaid, at Gestingthorpe aforesaid, in the county aforesaid, did take upon himself, and then and st there in the like manner did faithfully promife the faid 66 Thomas Butcher, that he the faid James would well and truly pay and fatisfy the aforefaid five pounds last menstioned to the fame Thomas Butcher, when he should be 46 afterwards thereunto requested. Nevertheless the afore-66 said James in nowise regarding his several promises and " undertakings aforesaid in form aforesaid made, but 66 contriving and fraudulently intending craftily and fub-66 tilly to deceive and defraud the faid Thomas Butcher, hath not yet paid the aforesaid several sums of money, or any part thereof, to the faid Thomas Butcher, nor hath hitherto in anywife contented him for the same, 66 (although to do this the same James afterwards, to wit, on the second day of August in the eighth year above-" faid, at Gestingthorpe aforesaid, in the county aforesaid, was requested by the same Thomas Butcher, ) but hath 66 hitherto altogether refused and still doth refuse to pay them to him, or any ways to content him for the same, " to the damage of him the faid Thomas Butcher of thirty " pounds: And therefore he brings suit, &c. "And now at this day, to wit, Monday next after three weeks from the day of St. Michael in this same term,

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" until which day the aforesaid James had leave to imparle to the aforesaid bill, and then to answer, &c. be-"fore our lord the king at Westminster comes as well the " aforesaid Thomas by his said attorney, as the aforesaid "James by John Clarke his attorney: And the fame James defends the force and injury, &c. and faith that " he did not take upon himself in manner and form as " the aforesaid Thomas above complains against him: 46 And of this he puts himself upon the country; and the aforesaid Thomas in like manner, &c. Therefore es let a jury come thereupon before the lord the king at Westminster, on --- next after --- and who neither, " &c. to recognize, &c. because as well, &c. The same " day is given to the parties aforesaid there," &c.

Non affumplit pleaded.

Pleas before our Lady the Queen at West-[ 735 ] minster, of the Term of St. Hilary in the First Year of the Reign of our Lady Anne. now Queen of England, &c. Roll 435.

### Coggs against Bernard.

[3 Ld. Raym. Entries 240. S. C.]

3 Salk. 11, 268. Holt 13, 131, 528. S. C. mise to take hogiheads of brandy out of one cellar and Cafely put them in another; for negligence.

Salk. 26.

Middlesex, " B E it remembered, That heretofore, to to wit, " B wit, in the term of St. Michael last past, 66 before our lady the queen at Westminster, came John 66 Coggs by Joseph Sherwood his attorney, and brought Declaration upon 66 into the court of our faid lady the queen then there defendant's pro- 66 his certain bill against William Bernard, in the custody of the marshal, &c. of a plea of trespass upon the case; 46 and there are pledges of profecuting, that is to fay, " John Doe and Richard Roe; which said bill followeth " in these words, that is to say, Middlesex, to wit, John " Coggs complains of William Bernard, in the custody of 66 the marshal of the Marsbalsea of our lady the queen, 66 before the queen herself being, for that, to wit, That whereas the aforesaid William, on the tenth day of Nowember in the thirteenth year of the reign of our lord William the Third, late king of England, &c. at the so parish of St. Clement Danes in the county of Middlesex " aforesaid, had undertaken safely and securely to take up "divers casks of brandy of the said John, then being in a " certain cellar situate in a certain place called Brooks-" Market

" Market in the parish of St. Andrew Holborn in the " county aforesaid; and had undertaken to put the same " fafely and fecurely in a certain other cellar fituate in a 66 certain other place called Water-fireet in the parish of " St. Clement Danes in the county aforesaid, the same William his fervants and agents afterwards, to wit, the 44 same day and year, at the parish of Saint Clement Danes 46 aforefaid, handled the casks of brandy aforesaid so ne-66 gligently and improvidently in putting them in the cel-" lar last mentioned, that for want of good care of the 44 said William, his servants and agents, one of the said 66 casks of brandy then and there was broken, and a great 44 quantity, to wit, one hundred and fifty bottles of the " brandy aforefaid in the same cask, was by that occasion of poured out upon the ground and spoiled. And whereas also the aforesaid William, afterwards, to wit, on the 66 same tenth day of November in the thirteenth year " abovefaid, at St. Clement Danes aforefaid in the county 64 of Middlesex aforesaid, had undertaken safely and securely to take up divers other casks of brandy of the said 56 John, then being in a certain other cellar fituate in a 66 certain place called Brooks-Market in the parish of St. " Andrew Holborn in the county aforesaid, and to place 55 those casks there on a carr to be carried to a certain other cellar lituate in a certain other place called Water-66 street in the parish of St. Clement Danes in the county aforesaid, and the said casks so as aforesaid, carried to "the last-mentioned cellur situate in Water-fireet afore-66 faid, from the faid carr fafely and fecurely there to let 46 down, and place in the cellar last mentioned; the same William, his fervants and agents afterwards, to wit, the 46 fame day and year abovefaid, at the parish of St. Cken ment Danes aforesaid in the county aforesaid, so neglisegently and improvidently handled the faid casks of " brandy last mentioned in laying them in the cellar last "mentioned, that for want of due care of the faid Wil-66 liam, his servants and agents, one of the same casks of " brandy last mentioned was then and there broken, and " a great quantity, to wit, one hundred and fifty bottles of the brandy last mentioned being in the same cask last 46 abovefaid, was by that occasion then and there spilt " upon the ground and destroyed: Wherefore the said 46 John faith, that he is injured and hath damage to the " value of one hundred pounds. And therefore he brings " fuit, &c.

"And now at this day, to wit, Saturday next after eight days from the day of Saint Hilary in this same term, until which day the said William Bernard had leave of imparling to the said bill, and then to answer, &c. before B b 4 "our

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Not guilty.

## Pleadings to the Cases.

cour lady the queen at Westminster, comes as well the s aforesaid John Coggs by his said attorney, as the said "William Bernard by William Collier his attorney; and " the same William Bernard defends the force and injury, " when, &c., and faith that he is not guilty thereof; and 66 of this he putteth himself upon the country; and the " before-said John Coggs in like manner, &c. " fore let a jury thereupon come before our lady the queen Venire awarded. 66 at Westminster, on Monday next after the morrow of the " Purification of the Blessed Mary, and who neither, &c. " to recognize, &c., because as well, &c. The same day " is given to the parties aforesaid there, &c.

Poster continued.

"Afterwards process thereon is continued between the 66 parties aforesaid of the plea aforesaid by the jury reof spited thereupon between them before our lady the queen at Westminster, until Thursday next after the mor-" row of the Purification of the Bleffed Mary then next 66 following, unless the trusty and well beloved of our 46 lady the queen, Sir John Holt, Knt. Chief Justice of our lady the queen appointed to hold pleas in the court 46 of our faid lady the queen, before the queen herself, come before on Wednesday next after eight days from "the day of the Purification of the Blessed Mary at West-" minster aforesaid in the county of Middlesex aforesaid, "in the great hall of pleas there, according to the form " of the statute, &c., for want of jurors, &c.

"At which day before our lady the queen at Westse minster comes the aforesaid John Coggs by his said at-[737] "torney, and the atorciate times junted." queen, before whom, &c. fent here his record before 66 torney, and the aforesaid Chief Justice of our lady the " him had in these words, Afterwards, at the day and 66 place within contained before John Holt, Kut., Chief Justice within written, having affociated to himself John 66 Ince, gent. by form of the flatute, &c., comes as well " the within named John Coggs as the within named Wil-66 liam Bernard, by their attornies within mentioned: And 66 the jurors of that jury being summoned likewise come, 46 who being chosen, tried, and sworn to speak the truth of the within contents, upon their oath say, that the 46 aforesaid William Bernard is guilty of the premises "within laid to his charge, in manner and form as the " aforesaid John Coggs within thereupon complaineth " against him, and affess the damages of him the said " John Coggs, by occasion thereof, besides his costs and charges by him applied about his fuit in this behalf, to ten pounds, and for those costs and charges to twenty " shillings: Therefore it is considered, that the said John " Coggs do recover against the aforesaid William Bernard " the damages aforefaid by the faid jury in form aforefaid

" affessed,

Judgment for the plaintiff.

affeffed, and also twenty and one pounds adjudged by "the Court of the faid lady the queen how here, to the " same John Coggs for his costs and charges aforesaid, by 66 his affent, of increase, which said damages in the whole 46 amount to thirty-two pounds; and the faid William 66 Bernard in mercy," &c.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Ninth Year of the Reign of William the Third, now King of England, &c.

## Harrison against Cage.

[3 Ld. Raym. Entries 403. S. C.]

Cambridgesbire, E E it remembered, That heretofore, 5 Mod. 411.
to wit, E to wit, in the term of Easter in the Salk. 24. Cards.
to minth year of the reign of our lord William the Third, 214. Helt 456.
to wow King of England, &c., before the lord the king at S. C. Westminster came Henry Harrison gentleman, by Mi-46 chael Johnson his attorney, and brought into the court of 46 the faid lord the king then there his certain bill against 46 Adlard Cage gentleman, and Elizabeth his wife, in the " custody of the marshal, &c., of a plea of trespass upon 46 the case; and there are pledges of prosecuting, to wit, 46 John Doe and Richard Roe; which faid bill followeth in Case against hest-band and wife these words, that is to say, Cambridgesbire, to wit, Henry upon promise of 46 Harrison gentleman complains of Adlard Cage gentle- marriage by her 46 man and Elizabeth his wife, in the custody of the mar- when sole. 46 shal of the Marshalsea of the lord the king, before the "king himself being, for that, to wit, That whereas the 46 aforesaid Elizabeth, whilst she was sole, to wit, on the "first day of April in the eighth year of the reign of our lord William the Third, now King of England, &c., at 66 Borough-Green in the county aforesaid, (in consideration 66 that the same Henry then and still being a bachelor and 66 not married, at the special instance and request of the 66 faid Elizabeth, then and there had agreed with the same " Elizabeth, and had taken upon himself and faithfully " promised the same Elizabeth, that he the same Henry " would marry the faid Elizabeth,) took upon herself and 66 then and there faithfully promifed that she the faid Eli-46 aabeth would marry him the faid Henry; and although

Breach.

# Pleadings to the Cales.

"the faid Henry, giving credit to the promise and assump-

" tion of the faid Elizabeth, altogether refused to contract e matrimony with any other woman, and yet continueth es a bachelor and unmarried, and always from the time of making the promise and assumption aforesaid (whilst the 66 said Elizabeth was single) was ready and often offered es legally to marry the same Elizabeth, to wit, at Borough-"Green aforesaid, in the county aforesaid; nevertheless 66 the faid Elizabeth, whilft she was fole, not regarding 46 her promise and assumption aforesaid, but contriving 46 and fraudulently intending craftily and fubtilly to de-" ceive and defraud the faid Henry in this behalf, hath 66 not married him the faid Henry, (although so to do the 46 aforesaid Elizabeth after her promise and assumption Request and re- " aforesaid made, to wit, on the twenty-ninth day of 46 April in the eighth year abovesaid, and often before and 46 afterwards, at Borough-Green aforesaid, in the county " aforesaid, was by the said Henry required,) but altoge-66 ther refused to marry him, and afterwards, to wit, on 46 the first day of October in the eighth year aforesaid, at " Borough-Green aforesaid, in the county aforesaid, mar-" ried the aforesaid Adlard contrary to the aforesaid pro-

" mile and affumption of the same Elizabeth: And "whereas also the aforesaid Elizabeth, whilst she was sole, " to wit, on the first day of May in the eighth year aboveso faid, was indebted to the same Henry in three hundred 56 pounds of lawful money of England, for money by him the faid Henry, at the special instance and request of the 66 faid Elizabeth and for the same Elizabeth (while she was

fufal. .

And marrying the defendant.

out for and lent

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Indebit. affump. 66 fole) before that time paid and laid out, and for money " by the same Elizabeth, while she was sole, before that to her when fole. 66 time borrowed and received of the faid Henry, and being 66 so indebted thereupon, the said Elizabeth (while she was " fole) on the same day and year last mentioned, at Boes rough-Green aforesaid, in the county aforesaid, in consderation thereof undertook and then and there faithfully 46 promised the said Henry, that she the said Elizabeth 46 would well and faithfully pay and fatisfy to the faid 66 Henry the same three hundred pounds: Nevertheless 66 the same Elizabeth (while she was sole) and the aforesaid 44 Adlard and Elizabeth, after the marriage between them " celebrated, not regarding the promise and undertaking 66 of the faid Elizabeth last mentioned in form aforesaid 66 made, but contriving and fraudulently intending the see fame Henry in this behalf craftily and fubtilly to deceive 44 and defraud, the before faid three hundred pounds have " not paid, nor hath either of them paid any part thereof 66 to the faid Henry, (although often requested,) but have 44 altogether refused and yet do refuse to pay the same to " him, 10

him, or anywise to content him for the same: Where-" fore the faid Henry faith that he is injured and hath da-" mage to the value of three thousand pounds: And " thereupon he brings suit, &c.

46 And now at this day, to wit, Wednesday next after the morrow of the Holy Trinity in this same term, until which day the aforesaid Adlard and Elizabeth had leave " to imparle to the faid bill, and then to answer, &c. beso fore the lord the king at Westminster comes as well the " faid Henry by his attorney aforesaid, as the aforesaid " Adlard and Elizabeth by Richard Edwards their attores ney: And the same Adlard and Elizabeth defend the force and injury, when, &c., and fay that the aforesaid 66 Elizabeth did not take upon herself in manner and form 46 as the aforesaid Henry above complains against them; 44 and of this they put themselves upon the country; and the faid Henry in like manner, &c. Therefore let a jury come thereupon before the lord the king at Westminster, on Wednesday next after three weeks from the day of the Holy Trinity: and who neither, &c. to recognise, " &c. because as well, &c. The same day is given to the aforesaid parties there, &c. Afterwards the proceed- Postes continu-" ings thereon are continued between the aforefaid par-edties of the plea aforesaid by the jury respited thereupon between them, before the lord the king at Westminster, until Monday next after three weeks from the day of St. "Michael from thence next following, unless the justices ee of the lord the king appointed to take affizes in the " county aforesaid, do first come on Thursday the eleventh day of August at the castle of Cambridge in the county aforesaid, by form of the statute, &c. for want of jurors, " &c. At which day, before the lord the king at West-" minster, comes the said Henry by his said attorney, and 44 the beforesaid justices before whom, &c., have sent se here their record had before them in these words, to "wit, Afterwards at the day and place within contained, Postea returned. 46 before Sir Edward Ward, Knt., Chief Baron of the Ex-46 chequer of our lord the king, and Thomas Knight, Efq., " for this turn affociate to the faid Sir Edward Ward, and 46 Sir Thomas Rokeby, Knt., one of the justices of the said 46 lord the king appointed to hold pleas before the king "himself, the justices of our said lord the king appointed 46 to take assizes in the county of Cambridge by form of " the statute, &c., the presence of the said Thomas " Roledy not being expected, by virtue of the writ of the " faid ford the king of so non owner, cometh the withinan named Henry Harrison by his attorney within mentionet ed, and the within written Adlard Cage and Elizabeth "his wife, although folemnly required, do not come, but

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have made default: Therefore let the jury whereof mention is within made be taken against them by de-

Defendants default.

Judgment.

Verdict for the

fault; upon which the jurors of that jury being likewife fummoned come, who being chosen, tried, and
fworn to speak the truth of the within contents, upon
their oath say, that the aforesaid Elizabeth did take upon
herself in manner and form as the aforesaid Henry
within complains against the said Adlard and Elizabeth,

and affets the damages of the same *Henry* by occasion of the non-performance of the promises and undertakings within specified, besides his costs and charges by him about his suit in this behalf applied, to four hundred

about his fuit in this behalf applied, to four hundred
 pounds, and for those costs and charges to forty shil lings: Therefore it is considered, that the asoresaid

"Henry Harrison do recover against the aforesaid Adlard Cage and Elizabeth his wife his aforesaid damages by the jury aforesaid in form asoresaid affessed, and also sixteen

" pounds for his costs and charges aforesaid, adjudged by the Court of our said lord the king now here to the said."

" Home he his offent, of increase which demograting the

"Henry by his affent, of increase, which damages in the whole amount to four hundred and eighteen pounds; and the aforesaid Adlard and Elizabeth in mercy, &c.

"Afterwards, to wit, on Saturday the twenty-fixth day

A writ of error in the Exchequer chamber.

of November, in the tenth year of the reign of our lord William the Third, now king of England, &c. transferipts of the record and proceedings aforesaid between the parties aforesaid of the plea aforesaid, with all things thereunto belonging, by pretence of a certain writ of the said lord the king, of correcting errors profecuted by the aforesaid Adlard and Elizabeth in the premises before the justices of the said lord the king of the Common Pleas, and the Barons of the Exchequer of the said lord the king of the faid lord the king of the coif in the chamber of the Exchequer aforesaid, according to the form of the statute made in the parliament of our lady Elizabeth, late queen of England, &c. held at Westminster on the twenty-third day of November in the

Error affigned.

twenty-seventh year of her reign, were transmitted from the aforesaid court of the said lord the king here, before the king himself; and the aforesaid Adlard and Elizabeth appearing in the same court of Exchequer-chamber, assigned certain matters for error to be had on the record and process aforesaid, for revoking and making void the judgment aforesaid, to which the aforesaid Henry likewise appearing in the same court of Exchequer-chamber aforesaid hath pleaded that there was nothing in anywise erroneous, either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid; and afterwards, to wit, on Tuesday the twen-

" ty-seventh

ty-seventh day of June in the eleventh year of the reign of our lord William the Third, now king of England, ್ ಆ c. as well the record and proceedings aforesaid, and 46 the judgment given upon the same, as the aforesaid es causes by the said Adlard and Elizabeth assigned and so alleged for error, being seen, and by the court of Ex-46 chequer-chamber aforefaid diligently examined and of more fully understood; it seemed to the same Court of 66 Exchequer-chamber aforefaid, that the faid record is in nowife faulty or desective, and that the said record was not anywise erroneous: Therefore it was then and Judgment asthere by the same Court of Exchequer-chamber afore- firmed. so faid confidered. That the judgment aforefaid should in 46 all respects be affirmed and stand in all its force and seffect, the faid causes and matters by the aforesaid Ad-" lard and Elizabeth assigned and alleged for error in anywife notwithstanding; and it was further then and "there by the same Court considered, that the aforesaid 46 Henry should recover against the said Adlard and Eliza-66 beth, ten pounds and ten shillings, adjudged by the Court there to the faid Henry by his affent, according to the "form of the statute for that purpose made and pro-" vided, for his damages, costs, and charges, which he 46 had by occasion of the delay of execution of the judges ment aforesaid, by pretence of the prosecution of the 66 faid writ of error; and thereupon the aforefaid record, Coffs adjudged, and also the proceedings of the said justices of the occasional by the delay of execution and remitter that the said barons of the tion and remit-66 Exchequer aforesaid, had before them in the premises tance of the rebefore the lord the king, wherefoever, &c. were then cord. " by the fame justices and barons fent back accord-" ing to the form of the statute, &c. and do now remain in the Court of the lord the king here before the se king himself, &c. Afterwards, to wit, on Wednesday es next after three weeks from the day of the Holy Tries nity in the thirteenth year of the reign of our lord William the Third, now king of England, &c. before " the faid lord the king at Westminster cometh the afore-66 faid Henry Harrison by his said attorney, and acknow- Satisfaction aces ledgeth himself to be satisfied by the aforesaid Adlard knowledged. and Elizabeth, concerning the debt, damages, costs, and se charges aforesaid: Therefore let the same Adlard and " Elizabeth be thereupon acquitted of the said debt, da-" mages, costs, and charges," &c.

[741]

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael in the First Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 223.

#### Justin against Ballin.

ting forth sta-2. whereby the

salk. 34. S.C. England, "BE it remembered, That on Friday next to wit, "BE after three weeks from the day of St. " Michael in this fame term, before the lady the queen Suggestion, set- " at Westminster, comes Nicholas Justin in his proper per-" son, and causes the Court of the said lady the queen tute of 13 Rich. " now here to understand and be informed, That whereas Admiralty have "in the statute made in the parliament of our lord no cognizance of 66 Richard the Second, late king of England after the any thing done upon the land. 

"Conquest, held in the thirteenth year of his reign at 
"Westminster in the county of Middlesex, it is amongst so other things ordained and enacted by the authority of "the fame parliament, that admirals and their deputies se from thence afterwards should in no fort intermeddle concerning any thing done within the kingdom of Eng-46 land, fave only concerning a thing done upon the fea, as was of right accustomed in the time of our lord Edward 44 late king of England, grandfather of the same lord the king Richard the Second, as in the same statute amongst Another statute 46 other things is more fully contained: And whereas also by another statute made in the parliament of the aforefaid late king Richard the Second, in the fifteenth se year of his reign, held at Westminster aforesaid in the " faid county of Middlefex, it is amongst other things declared, ordained, and established, that the Court of Adso miralty should have no cognizance, power of jurisdic-

(15 R. 2.) to the same purpole.

> " plaints, and all other things arifing within the bodies of counties, as well by land as water, as aforefaid, and also wreck of sea, should be determined, tried, discussed, and remedied by the law of the land, and not before the admiral or admirals, nor by his lieutenant in any manor as in the same statute is also amongst other things "more fully contained: And whereas also in the parlia-"ment of our lord Henry the Fourth, late king of Eng-44 land after the Conquest, held in the second year of his reign at Westminster in the county aforesaid, it is amongst

" other

tion of all contracts, pleas, and complaints, and of all other things done or arising within the bodies of counties, as well by land as by water, and also of the wreck of the fea, but that all fuch contracts, pleas, and com-

Another flatute (2 H. 4.) con-farming the former.

so other things ordained and enacted, that the aforefaid se statute of the aforesaid year of our said late King Richse ard the Second, should be held and kept and carried into 44 due execution as in the fame statute amongst other "things is contained: And whereas also all and singular opleas and affairs touching or concerning the validity, explication, interpretation, construction, or exposition That the expoof any statutes in all parliaments whatsoever of our said sition of the sta-66 lady the now queen, or her progenitors, late kings or tutes belongs to queens of England, enacted, made, and provided, and pont. 46 all and fingular pleas and conusance of pleas for any trespasses, contracts, trespasses upon the case, for the 46 taking, detaining, or converting of any goods or chat-"tels, or for any other cause whatsoever, as well upon 46 land as upon water, within the body of any county 46 within this kingdom of England, or elsewhere upon 46 land, happening, arifing, emerging, done, or brought to any person or persons, do specially belong and apper-66 tain to our lady the now queen and her royal crown, 46 and by the laws and statutes of this realm of England 66 ought, and from time past always hitherto were accustomed to be tried, determined, and discussed in the queen's temporal courts of record, before the lady the 46 queen now here, or before her temporal justices or 66 judges, and not before the lord admiral of England, nor " by the admiral of England, or his lieutenant or deputy in any manner: Nevertheless one John Ballam and one 66 William Hart not being ignorant of the premises, but so contriving unjustly to burthen, oppress, and aggrieve sthe said Nicholas Justin, contrary to due course of the " law of this kingdom of England, and contrary to the Breach. " form of the several statutes aforesaid, and to draw the " conusance of a plea which specially belongs and apper-" tains to our faid lady the now queen and her royal ec crown to another examination in the court of Admi-" ralty before the Right Honourable Sir Charles Hedges, 46 Knt. doctor of laws and supreme judge of the court of "Admiralty of England, or his deputy or furrogate, or fome other competent judge in that behalf, by virtue of 46 a certain process out of the said court of Admiralty, for By process out the profecution of a ship called The Swan of Norway, of the Admirate, for goods and lawhereof Berent Gertson lately was, but John Orce, other-bour. " wife Ord, otherwise Larwick, is now master, and its " rigging and appurtenances; and the faid Nicholas Justin 66 being owner of the faid ship, for and concerning divers "wares and merchandizes, works and labours by the foresaid J. Ballam and W. Hart sold, delivered, done, " found, and provided for the faid thip, out of the jurif-46 diction of that court, unjustly drew into plea, warily and " oraftily

## 743 ‡

## Pleadings to the Cafes.

craftily libelling and fuggesting against the said ship,
and the aforesaid Nicholas Justin in the same court of
Admiralty, amongst other things, as followeth, that is

Libel fet forth.

[744]

to say: First, That in the month of November in the " year of our Lord one thousand seven hundred, and for " feveral months before and after, the faid Berent Gertson of Norway was the master and commander of the said " ship the Swan, and had the care and government of her " as master, and was put in and appointed master of her " by her owner, who was then an inhabitant of Norway " and a subject of the King of Denmark, but is since dead, " and so much the said Berent Gertson hath confessed and 66 declared, and this was and is true, public, and notorious, and alleges every thing jointly and severally: Also, That 66 in the faid month of November, in the year of our Lord " one thousand seven hundred, the said ship the Swan be-" ing upon the high and open feas near the port of Lon-" don, within the jurisdiction of the High Court of the "Admiralty of England, and then standing in great need " of a new cable, a coil of small ratlin, a new anchor, and "the other things mentioned in the two schedules here-" unto annexed, the faid John Ballam and William Hart "did thereupon, at the special instance and request of the " faid Berent Gertson, then master and commander of the ·66 faid ship upon the high and open seas, and within the " jurisdiction aforesaid, furnish and supply the said ship "with the cable, anchor, and other things mentioned in "the faid two schedules, at the respective rates sche-" dulate, to wit, the faid John Ballam furnished and sup-" plied her with the cable, small ratlin, and the other 66 things mentioned in the first of the said schedules 66 No 1, and at the rates there fet down, amount-" ing in all to the fum of one hundred and four pounds 66 fifteen shillings sterling, and the said William Hart fur-" nished and supplied her with the anchor and the other things mentioned in the faid other schedule N' 2, and " at the rates there fet down, amounting in the whole to "the fum of nineteen pounds eleven shillings and six-" pence sterling, and the said cable, anchor, and other "things mentioned in the faid two schedules, were at the time and place aforesaid sent and delivered by the said John Ballam and William Hart, or their order, on board " the faid ship, and have ever since and now are belonging 66 to her and applied to her use, and the same were, at " the time of their being fent and delivered on board the " faid ship, really and truly worth the respective rates and " fums of money schedulate, and the like fort of goods "were then usually fold at the same rates; and this was so and is true, public, and notorious, and fo much the faid " Berent Gertson hath confessed and declared to several of persons,

persons, but lays it of other good sums at the time and place, &c., and as above: Also, That the said ship the Swan, 66 shortly after the said cable, anchor, and the other things es mentioned in the faid two schedules, were sent and delivered on board her as aforesaid, proceeded to Norway, se and did then and ever, and now doth belong to that of place, and the said Berent Gertson her late master, did, 46 and do all refide in Norway, and were and are subjects to the King of Denmark; and this was and is true, pub-66 lic, and notorious, and so much the said John Orce, otherwise Ord, otherwise Larwick, hath lately confessed " and declared to feveral persons, and sets forth as above: 46 Also, That the said several sums of money mentioned in the faid two schedules, in all amounting in the whole to 46 the sum of one hundred twenty-four pounds six shil-" lings and fixpence sterling, are really and truly due to the said John Ballam and William Hart, for the said cable, anchor, and the other things schedulate, and the s faid John Orce, otherwise Ord, otherwise Larwick, the present master of the said ship, hath lately confessed and 46 declared to several persons, that the aforesaid sums of 46 money are yet unpaid, and that it is so set down in in-66 structions given him by the said Nicholas Justin the owner of the said ship, or to that effect, as before: Also, - 66 That the said John Ballam and William Hart have sees veral times demanded the sums of money due to them 44 as aforesaid, of the present master of the said ship, per-66 fonally, and of her faid owner by letters, but they re-66 fusing or delaying to pay for the same, and the said " John Ballam and William Hart having no remedy for 66 the recovery thereof, but by arresting the said ship in "the High Court of Admiralty of England, have caused the same to be arrested by virtue of a warrant from the se said Court, and all persons having or pretending to \*6 have any right, title, or interest therein, to be duly cited to appear in the said court to answer to them the se said John Ballam and William Hart, in a cause or causes se civil and maritime; and the said Nicholas Justin has there appeared by his proctor, and submitted himself to the jurisdiction of the said court, and as owner of the 46 faid ship given bail to answer the action brought by the se said John Ballam and William Hart against the said 66 ship, and to abide by the judgment of the said Court, s and to pay what shall be adjudged, together with the expences of fuit, and thereupon procured the faid ship to be released from the said arrest, as by the proceedings so of the faid Court, to which the party proponent refers " himfelf, doth appear.

[745]

Nº 1, Delivered for the use of the ship Swan of Long-sound, Mr. Berent Gertion, Commander, November the 16th, 1700, per John Ballam.

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q. Ib.
        10 A cable of 15, in full 120
              fathom.
         3 A coil of small ration.
                                          f. s. d.
        13 at 35 s. per hundred is
                                         104 6
59
One hand-line, 4 skains of markin and
  housen,
Lighteridge on board,
                                         304 35
```

No 2, Smith's work to the ship Swan, Berent Gertson, [746] Muster, November the 25th, 1790, by William Hart.

For one new anchor, weighing	12 C.	٤٠	s.	d.
24 lb. per contract, -		19	0	4
For one hundred five-inch nails,		0	4	2
For one hundred four-inch nails,		0	2	6
For two hundred of nails,	-	0	3	0
For mending one pump-iron,		0	I	6
		19	11	6

"Also that all and singular the premises were and are 44 true and notorious, as by a true copy of the aforesaid

46 libel in the court of the faid lady the queen, before the of queen herfelf now here had, read, and heard, amongst " other things more fully appears, when, in truth, the wares and merchandizes, works, and labours aforefaid, Averment, That " were found, provided, done, fold, and delivered for the " aforesaid ship in the river of Thames, to wit, in the pa-" rish of St. Paul Shadwell, in the county of Middlefex, river of Thames. 66 and not upon the high sea, nor within the jurisdiction " of the Court of Admiralty aforefaid, as by the libel " aforefaid is above supposed; to all and singular which 66 matters the same John Ballam and William Hart un-" justly constrained him the said Nicholas Justin to appear

> " in the said Court of Admiralty, before the aforesaid 46 judge of the same Court, concerning the premises, and

the goods and work were for the ship in the

« and

and concerning the same; and although the same Nicholas Justin in the faid Court of Admiralty, before the Plea in the Ad-44 aforefaid judge of that court, did plead and allege all and miralty. 66 fingular the premises by him above suggested and al-66 leged for his discharge and dismission from thence in 46 this behalf, and offered to prove the fame by inevitable testimony and truth; yet the same judge of that court hath altogether refused and still refuses to admit the said of plea, allegation, and proof: And the before aid John 66 Ballam and William Hart do, with all their power, en-"deavour and daily contrive to compel him the same Ni-" cholas Justin to answer of and concerning the premises 44 aforesaid, and to be condemned in the premises by the se sentence and final decree of the Court of Admiralty 66 aforesaid, in contempt of the said lady the now queen, in disherison of her crown and dignity, and to the dae mage, impoverishment, and manifest grievance of the 46 same Nicholas, and against the law and custom of the ee realm of the faid lady the now queen of England, and 46 also against the form and effect of the several statutes aforesaid in such case in form aforesaid made and provided: And this the same Nicholas Justin is ready to verify: Wherefore the same Nicholas, humbly imploring the aid and bounty of the Court of the said lady the queen, before the now queen herself, prays for himself a remedy, and a writ of prohibition of the said lady the [747] queen here, to be directed to the faid judge of the Court of Admiralty aforesaid, or to any other competent judge whatsoever in this behalf, to prohibit him or them that he or they hold not plea in any manner touching or concerning the premises aforesaid, before him or them, &c. " And it is granted to him," &c.

Pleas before the Lord the King at Westminster, of the Term of Easter in the Twelfth Year of the Reign of William the Third, now King of England, &c. Roll 108.

Hillyard against Cox.

[3 Ld. Raym. Entries 468. S. C.]

Berkshire, "BE it remembered, That heretofore, to salk. 37. to wit, "BE wit, in the term of St. Michael last past, "before our lord the king at Westminster, came Daniel C c 2 "Hillyard

"Hillyard clerk, administrator of all and singular the goods and chattels, rights and credits, which were of "John Cox deceased, at the time of his decease, who died

Indebitatus affumplit by an administrator for goods fold and delivered by the intellate.

[748]

Quantum me-

" intestate, by Edward Chapman his attorney, and brought 46 into the court of the faid lord the king then there his " certain bill against Thomas Cox in the custody of the " marthal, &c., of a plea of trespass upon the case; and " there are pledges of profecuting, namely, John Doe and " Richard Ros; which faid bill is in these words, that is 66 to say, Berksbire, to wit, Daniel Hillyard clerk, admi-" nistrator of all and fingular the goods and chattels, " rights and credits, which were of John Cox deceased, at " the time of his death, who died intestate, complains of "Thomas Con in the custody of the marshal of the Mar-" fbalsea of the lord the king, before the king himself be-" ing, for that, to wit, That whereas the aforesaid Thomas, 66 on the first day of March in the eleventh year of the " reign of our lord William the Third, now King of Eng-" land, &c., at Farringdon in the county aforesaid, was 44 indebted to the aforesaid John in his lifetime in one 44 hundred shillings of lawful money of England, for divers goods, wares, and merchandizes of the same John " by the beforesaid John in his lifetime to the said Thoes mas, at the especial instance and request of the same "Thomas, before that time fold and delivered: And being 66 fo indebted the aforefaid Thomas in confideration thereof 46 afterwards, to wit, the same day, year, and place abovese said, undertook, and then and there saithfully promised " the said John in his lifetime, that he the aforesaid Tho-" mas would well and truly pay and fatisfy the faid one " hundred shillings to the said John, when he should be " thereunto afterwards requested: And whereas also afterwards, to wit, on the second day of March, in the eleventh year abovefaid, at Farringdon aforefaid, in consi sideration that the said John in his lifetime, at the like instance and request of the same Thomas, had sold and delivered to the same Thomas divers other goods, wares, " and merchandizes of him the faid John, the faid Thoes mas took upon himself, and then and there faithfully promised the same John, that he the aforesaid Thomas " would well and truly pay and fatisfy the faid John to " much money for the goods, wares, and merchandizes se aforcfaid last mentioned, as those goods, wares, and " merchandizes, at the time of the felling and delivering "thereof, were reasonably worth, when he should be as-" terwards thereunto requested: And the said Daniel in " fact faith, that the goods, wares, and merchandizes " aforesaid last mentioned at the time of the sale and de-44 livery thereof were reasonably worth another hundred " shillings

66 shillings of like lawful money of England, to wit, at Farringdon aforesaid; and thereof the same Thomas then 46 and there had notice: Nevertheless the aforesaid Tho- Breach. mas his aforefaid promifes and affumptions in form se aforesaid made not regarding, but contriving and fraud-" ulently intending the same John in his lifetime, and the " aforesaid Daniel after the death of the said John, in this behalf craftily and fubtilly to deceive and defraud, hath 46 not paid the several sums of money aforesaid to the said " John in his lifetime, or the aforesaid Daniel after the " death of the faid John, (to which faid Daniel adminis-" tration of all and fingular the goods and chattels, rights and credits, which were the aforesaid John's at the time of his death, was in due form committed by Joseph Letters of admi-66 Woodward, doctor of laws, and archdeacon of the arch-"deaconry of Berks, official lawfully appointed, after the 46 death of the same John, to wit, on the tenth day of " April in the year of our Lord one thousand six hundred of ninety and nine, at Farringdon aforesaid, to which off-46 cial the committing of the administration aforesaid in "this behalf did of right belong,) nor hath anywife contented them, or either of them, for the same; although 66 to do this the aforesaid Thomas, after the death of the 66 said John, and after the administration aforesaid in form 46 aforesaid committed, to wit, on the twentieth day of Requel. 46 April in the eleventh year abovefaid, at Farringdon se aforesaid, by the aforesaid Daniel was requested, but 46 hath altogether refused to pay or anywise satisfy the s fame unto the faid John in his lifetime, and the aforeso said Daniel after the death of the said John, and still refuses to pay or satisfy the same to the said Daniel: Wherefore the said Daniel saith, that he is injured, and 46 hath damage to the value of ten pounds: And therefore " he brings suit, &c. "And the same Daniel brings here into Court the let-

ters of administration aforesaid of the said Joseph Wood- Profert of the ward, which testify the commission of the administra- letters of admition aforesaid in form aforesaid, the date whereof is on militation.

nistration.

" the day and year abovesaid. "And now at this day, to wit, Wednesday next after Prays over of the " fifteen days from the day of Easter in this same term, letters of admi-" until which day the aforesaid Thomas Cox had leave to " imparle to the aforesaid bill, and then to answer, &c. " before the lord the king at Westminster comes as well the " aforesaid Daniel Hillyard by his said attorney, as the " aforesaid Thomas Con by Edward Serle his attorney: "And the same Thomas defends the force and injury, " when, &c. and prays oper of the aforesaid letters of ad-

"ministration now here produced in Court, and in the " declaration

" declaration aforesaid above specified; and they are read 66 to him in these words, to wit, Joseph Wesdward, doctor " of laws and archdeacon of the archdeaconry of Berk-" fbire, official lawfully constituted, to our beloved in "Christ Daniel Hillyard clerk, principal creditor of John "Cox, when living, of Newbery within the county and " archdeaconry of Berks aforefaid, green, lately deceased, " greeting in the Lord: Whereas the faid John Cox, so " as aforesaid deceased, lately died intestate, We there-" fore defiring that the goods, rights, and credits of the " faid deceased be well and faithfully administered and " converted, and disposed to be administered to pious ules; Therefore for the well and faithfully disposing of the goods, rights, and credits of the aforesaid de-" ceased, and also for demanding, collecting, levying, and er requiring all credits whatfoever of the faid deceafed, " and which belonged to the faid deceafed whilst he ived, and at the time of his death, and for the payes ment of what the faid deceased at such time of his "death was indebted, as far as fuch goods, rights, and er credits extend, according to the value thereof; it is " permitted you, in whose sidelity we do in this behalf confide, being fworn in due form of law upon GOD's "Holy Evangelists, well and faithfully to administer the " fame, and to make a full and faithful inventory of all 66 and fingular the goods, rights, and credits of the faid deceased; and to exhibit the same into the registry of the faid archdeacon of Berks aforefaid, on or before the first day of the month of June next onfuing, and also to ren-"der thereof a full and true account, calculation, or esti-" mation of and concerning your addition on or before · the first day of March, which shall be in the year of " our Lord one thousand fix hundred and ninety and nine: " By the tenor of these presents we commit full power, " and ordain, depute, and constitute you by these pre-66 fents, administrator of all and singular the goods, rights, " and credits of the faid deceafed Anne Cox, widow and " relict of the same deceased, having first renounced in " writing the administration of the goods, &c. Dated " at Oxford under the feal of our office, on the aforefaid " tenth day of April in the year of our Lord one thousand " fix hundred and ninety and nine.

[ 750]
Pleads that the injectione of his death lived in another diecese.

"Which being read and heard, the same Thomas saith, that the aforesaid Danie! his said action thereupon against him ought not to have or maintain, because he saith that the aforesaid Thomas, at the time of the death of the said John Cox, and at the time of the committing the administration aforesaid, and long before, was an inhabitant and resiant in the city of Oxford in the

" county

county of Oxford, which faid city is and always was " within the diocese of Oxford, and out of the arch-" deaconry of Berksbire aforesaid, and the jurisdiction of "the archdeacon of that archdeaconry, which faid archdeaconry and the whole county of Berkshire aforesaid " are and always were within the diocese of Salisbury, and " not within the diocese of Oxford; by which the com-" mitting of administration of all and singular the goods 46 and chattels, rights and credits, which were the faid " John Cox's at the time of his death, of right belonged to Thomas by Divine Providence then and still arch-" bishop of Canterbury, by reason of his prerogative, and on to the aforesaid archdeacon of the archdeaconry of 66 Berks, or any other inferior judge; and the said letters of administration produced here in court are void and of on effect in law: And this he is ready to verify: Wherefore he prays judgment if the aforesaid Daniel ought to 66 have or maintain his faid action thereupon against him,

"And the aforesaid Daniel Hillyard saith, that he, not- Demurrer with withstanding any matters by the aforesaid Thomas Cox spec al causes.

" above in pleading alleged, ought not to be precluded 44 from having his faid action thereupon against the same "Thomas, because he saith that the plea aforesaid by him "the same Thomas, in manner and form aforesaid above 66 pleaded, and the matter in the fame contained, are not " fufficient in law to preclude him the faid Daniel from " having his faid action thereupon against the faid Tho-" mas: To which faid plea in manner and form aforefaid " above pleaded, he the same Daniel need not, nor is bound by the law of the land in any manner to answer: "And this he is ready to verify: Wherefore, for want of a fufficient plea in this behalf, the same Daniel prays " judgment, and his damages by occasion of the premises " to be to him adjudged, &c. And for causes of demurrer " in law, according to the form of the statute in such case so made and provided, the faid Daniel shews and demon-" strates to the Court here these causes following, to wit, " for that it doth not appear by the plea aforesaid, that " the aforesaid Thomas Cox was not an inhabitant within "the diocese of the bishop of Salisbury at the time of the " death of the aforefaid John Cox; and that the faid plea " is uncertain and wants form, &c.

"And the aforesaid Thomas Cox saith, that the plea Joinser, " aforesaid by him the said Thomas in manner and form " aforesaid above pleaded, and the matter in the same " contained, are good and fufficient in law to preclude him " the faid Daniel from having his faid action thereupon " against him the said Thomas, which said plea, and the Cc4

"
matter in the same contained, the same Thomas is ready
to verify and prove as the Court, &c. And because
the said Daniel hath not answered to that plea, nor hath
hitherto in anywise contradicted it, the said Thomas, as
before, prays judgment, and that the aforesaid Daniel be
precluded from having his action aforesaid thereupon
against the said Thomas, &c. But because the Court of
the said lord the king now here are not yet determined
of giving their judgment of and upon the premises, a day
is therefore given to the parties aforesaid before the lord
the king at Westminster, until — day next after —
of hearing their judgment thereon, for that the Court of
the said lord the king now here thereof not yet," &c.

Pleas before our Lord the King at Westminster, of the Term of the Holy Trinity in the Twelsth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 369.

#### Gidley against Williams.

Salk. 37. Cases Cornemell, "BE it remembered, That heretofore, to be. R. 443. to wit, "BE wit, in the term of Easter last past, be-44 fore the lord the king at Westminster came Thomasin.
44 Gidley widow, administratrix of all the goods and chattels of Richard her husband lately deceased, by Peter " Champion her attorney, and brought into the Court of " the faid lord the king then there her certain bill against " Petherick Williams, otherwise called Petherick Booth, of " the parish of Withiel in the county of Cornwall, yeo-" man, in the custody of the marshal, &c., of a plea of " debt; and there are pledges of profecuting, namely, " John Doe and Richard Roe; which faid bill followeth in these words, that is to say, Cornwall, to wit, Tho-Declaration by an administratrix se masin Gidley, widow and administratrix of all the goods upon a bill obli-gatory to the in- " and chattels of Richard Gidley her husband lately de-" ceased, complains of Petherick Williams, otherwise called testate. " Petherick Booth, of the parish of Withiel in the county of " Cornwall, yeoman, in the custody of the marshal of the Marsbalsea of our lord the king, before the king himself being, of a plea, that he render to her twenty pounds of " lawful money of England, which he oweth to her, and " unjustly detains, for that, to wit, That whereas the 752 " aforesaid

26 aforesaid Petherick, on the tenth day of June in the year N. B. Defendant one thousand six hundred and eighty-five, at Great St. not having de-66 Collumbe in the county aforesaid, by his certain bill ob- bringing this ac-" ligatory, scaled with the scal of him the said Petherick, tion in the debet est ligatory, sealed with the seas of num the faid lord the king now and detinet is and shewn to the Court of the said lord the king now cured by the verfor here, the date of which is the same day and year, ac- diff. i Sid. 46 knowledgeth himself to owe and be indebted to the 342-379 Show. 66 same Richard Gidley in his lifetime, in the entire sum of 57. ten pounds of good and lawful money of England, to be of paid to the same Richard in his lifetime, his executors, " administrators, or assigns, at or upon the tenth day of "December next following the date of the aforesaid bill obligatory, and for the true payment thereof bound " himself, his executors and administrators, in the full sum of twenty pounds of lawful English money; and the said of Thomasin in fact saith, that the aforesaid Petberick did on not pay to the same Richard in his lifetime the aforesaid 66 sum of ten pounds, at or upon the tenth day of Decem-66 ber next following the date of the bill obligatory afore-66 faid, which he ought to have paid to the faid Richard " upon the fame day, according to the form and effect of st the bill obligatory aforesaid: Whereby an action hath accrued to the same Richard in his lifetime, and to the s said Thomasin after the death of the said Richard, to rese quire and have of the aforesaid Petherick the aforesaid fum of twenty pounds: Nevertheless the aforesaid Pe- The granting letters of admitherick, although often requested, &c., hath hitherto nistration ought 44 altogether refused to pay the beforesaid twenty pounds to have been into the faid Richard in his lifetime, or to the same Tho- serted here. es masin after the death of the said Richard, and still rese fuleth to pay the same to the said Thomasin, to the da-" mage of the said Thomasin of twenty and five pounds: 44 And therefore the brings fuit, &c. And the aforefaid "Thomasin brings here into court the aforesaid letters of 44 administration of the aforesaid Richard, whereby it suf-66 ficiently appears to the Court here, that the aforesaid

46 and thereupon hath administration, &c. "And now at this day, to wit, Friday next after the Imparlance. 46 morrow of the Holy Trinity in this same term, to which 46 day the aforesaid Petherick had leave to imparle to the 44 faid bill, and then to answer, &c. before the lord the si king at Westminster, comes as well the aforesaid Thoma-46 fin by her faid attorney; and the fame Petherick, by Joseph Hawkey his attorney; and the same Petherick de-" fends the force and injury, when, &c., and faith that he 46 ought not to be charged with the debt aforefaid by vir-" tue of the faid bill obligatory, because he saith that the " aforesaid

"Thomasin is the administratrix of the aforesaid Richard,

46 aforesaid bill is not his deed: And of this he puts him-46 felf upon the country; and the aforesaid Thomasin in 46 like manner, &c.

"Therefore let a jury come thereupon before the lord the king at Westminster, on Wednesday next after three

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weeks from the day of the Holy Trinity; and who nei-" ther, &c. to recognize, &c., because as well, &c. The " fame day is to the parties aforesaid there, &c. Afterwards the proceedings are thence continued between the " aforesaid parties of the plea aforesaid, by the jury re-66 spited thereupon between them, before the lord the king 44 at Westminster, until Wednesday next after three weeks " from the day of the Holy Trinity then next following, " unless the justices of the lord the king appointed to take the affizes in the county aforesaid first come on the " ninth day of August at Launceston in the county afore-" faid, by form of the statute, &c., for default of jurors, " &c. At which day, before the lord the king at West-"minster, comes the aforesaid Thomasin by her said attor-66 ney; and the beforesaid justices of the lord the king, 66 before whom, &c. sent here their record had before "them in these words; Afterwards, at the day and place within mentioned, before Sir John Powell, Knt., one of " the justices of our lord the king of the bench of our said 66 lord the king appointed to take the affizes in the county of Cornwall, and Francis Swanton Elq., affociate to the se same John Powell, for this turn, by the form of the sta-" tute, &c., came the within-named Thomasin Gidley, wi-66 dow, by her attorney within mentioned; and the with-

Return of the postes.

Default.

Ve.d.cl for the

quired, did not come, but made default: Therefore let " the jury, whereof mention is within made, be taken "against him by default. And the jurors of that jury be-" ing summoned came, who being elected, tried, and " fworn to speak the truth of the within contents, upon 46 their oath fay, that the bill obligatory within mentioned is the deed of the aforesaid Petherick Williams, as the 66 aforesaid Thomasin hath within against him declared. 44 and affels the damages of the faid Thomasin, by occasion of the detention of the within-written debt, over and " above her costs and charges by her about her suit in "this behalf applied, to two-pence, and for those costs 46 and charges to forty shillings: Therefore it is considered, that the aforesaid Thomasin do recover against the 46 aforefaid Petherick her faid debt and the damages afore-" faid by the jury in form aforefaid affeffed; and also

"thirteen pounds and ten shillings for her costs and charges by the Court of the said lord the king now here

" adjudged

"in-named Petherick Williams, although folemnly re-

adjudged to the said Thomasin, by her assent, of increase:
Which said damages in the whole amount to sisteen
pounds ten shillings and two-pence; and that the said
Petherick be taken," &c.

Pleas before our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 90.

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# Slater against May.

London, "BE it remembered, That heretofore, to wit, 3D. 351. p. 4. to wit, "BE in the term of Easter last past, before the Salk, 27. " lady the queen at Westminster came John Slater, admi- Salk. 42. " nistrator of all and singular the goods, rights, and credits which were Christopher Youlden's deceased at the time " of his death, by Thomas Moore his attorney, and brought " into the court of the faid lady the queen then there his " certain bill against John May in the custody of the " marshal, &c., of a plea of trespass upon the case; Declaration by "and there are pledges of profecuting, namely, John an administrator of Doe and Richard Roe; which said bill followeth in sence of the exethese words, that is to say, London, to wit, John Slater, cuter, for money administrator of all and singular the goods, rights, and testate. " credits which were Christopher Youlden's deceased, at " the time of his death, complains of John May, in the " custody of the marshal of the Marshalfea of the " lady the queen, before the queen herself being, for " that, to wit, That whereas the aforesaid John May, on "the twenty-third day of January in the year of our Lord one thousand six hundred ninety and nine, at " London, to wit, in the parish of St. Mary le Bow in the Indebitatus asward of Cheap, was indebted to the faid Christopher in sumpfit. " his lifetime in thirty pounds of lawful money of Eng-" land, for so much money of the same Christopher in his " lifetime, by him the faid Christopher in his lifetime to " the faid John May, at the special instance and request " of him the faid John May, before that time lent and " accommodated; and being fo thereupon indebted, he " the faid John May, in confideration thereof, afterwards, " to wit, the same day and year abovesaid, at London " aforefaid in the parish and ward aforesaid, took upon " himself, and then and there faithfully promised the said " Christopher

" Christopher in his lifetime, that he the said John Mag" would well and faithfully satisfy and pay the aforesaid thirty pounds to the same Christopher, when afterwards he should be thereunto requested: And whereas also the aforesaid John May afterwards, to wit, the same day and year abovesaid, at London aforesaid in the pa-

Another indebitat. affump for money had and received to the intestate's use.

" rish and ward aforesaid, was indebted to the said " Christopher in his lifetime in other thirty pounds of like " lawful money of England, for so much money of him " the said Christopher in his lifetime, by the said John " May for the same Christopher, and to the use of him the " faid Christopher, before that time had and received; " and being so indebted, the aforesaid John May after-" wards, to wit, the same day and year abovesaid, at " London aforesaid, in the parish and ward aforesaid, in " confideration thereof, took upon himself and then and "there faithfully promifed the same Christopher in his " lifetime, that he the faid John May would well and " truly pay and satisfy the said thirty pounds last men-" tioned to the faid Christopher, when he should be there-" unto afterwards requested: Nevertheless the said John "May his feveral promifes and undertakings aforesaid in " form aforefaid made not regarding, but contriving and

Breach.

Letters of adminifiration set forth. "which said John Slater administration of all and singu"lar the goods, rights, and credits which were the aforesaid Christopher Youlden's at the time of his death, with
his will annexed, for the use and benefit and during
the absence of Elizabeth Vittery, the executrix named
in the said will, by Thomas by Divine Providence archbishop of Canterbury, primate and metropolitan of all
England, on the sisteenth day of October in the year of
our Lord one thousand seven hundred and three, at
London aforesaid in the parish and ward aforesaid were
in due form of law committed) hath not paid the said
several sums of money, or any part thereof, to the said
Christopher in his lifetime, or to the said John Slater
after the death of him the said Christopher, nor hath
hitherto in any manner contented them for the same

"fraudulently intending in this behalf craftily and subtilly to deceive and defraud the said Christopher in his
lifetime, and the said John Slater after the death of the
faid Christopher, of the said several sums of money (to

Request.

"hitherto in any manner contented them for the same (although to do this the aforesaid John May by the said "Christopher in his lifetime, and by the said John Slater after the death of the said Christopher, and the committing of the administration aforesaid at London aforesaid in the parish and ward aforesaid was requested); but altogether resused to pay or in any manner to satisfy the same unto the said Christopher in his lifetime, "and

and yet refuseth to pay them to the said John Slater, " to the damage of him the said John Slater of forty of pounds: And thereupon he brings suit, &c. And the " faid John Slater brings here into Court the faid letters " of administration aforesaid of the said archbishop, which testify the commission of the administration " aforesaid to the said John Slater in form aforesaid, the date whereof is the same day and year in that behalf

" abovementioned, &c.

" And now at this day, to wit, Friday next after the es morrow of the Holy. Trinity in this same term, until " which day the faid John May had leave to imparle to " the aforesaid bill, and then to answer, &c. before the " lady the queen at Westminster comes as well the said " John Slater by his faid attorney, as the faid John May " by Richard Gates his attorney: And the same John " May defends the force and injury, when, &c. and faith " that the declaration aforesaid, and the matter therein Demurrer to the contained, are not sufficient in the law for the said declaration. " John Slater to have and maintain his faid action there-" upon against him the said John May; and that he hath " no need, nor is bound by the law of the land in any " manner to answer the said declaration in manner afore-" faid declared: And this he is ready to verify: Where-"fore for defect of a sufficient declaration in this behalf, "the faid John May prays judgment, if the faid John "Slater ought to have this faid action against him the " said John May, &c. And for causes of demurrer in " law in this behalf, the same John May, according to " the form of the statute in such case lately made and " provided, sheweth and pointeth out to the Court here "these causes following, to wit, That the declaration " aforesaid is altogether uncertain, double insensible, in-" sufficient in law, and wants form, &c. And the afore-" faid John Slater saith, that notwithstanding any thing by the said John May above alleged, the declaration " aforesaid of the said John Slater ought not to be quash-" ed, because he saith that the declaration aforesaid, and " the matter in the same contained, are good and sufficient in the law for him the said John Slater to have " and maintain his faid action thereon against him the " faid John May: Which faid declaration and the mat-" ter in the same contained the said John Slater is ready " to verify and prove as the Court, &c. And because " the aforesaid John May hath not answered to that de-" claration, nor hath hitherto anywise contradicted it, " the faid John Slater prays judgment and his damages by occasion of the premises to him to be adjudged, &c. " But

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\*\* But because the Court of our said lady the queen.

\*\* now here are not yet determined of giving their judg
\*\* ment of and concerning the premises aforesaid, a day

\*\* therefore is given to the aforesaid parties before the

\*\* lady the queen at Westminster, until ———— day next

\*\* after —— of hearing their judgment of and concern
\*\* ing the said premises, for that the Court of the said

\*\* lady the queen here thereof are not yet,\*\* &\*c.

Pleas before the Lord the King at Westminster, of the Term of St. Michael in the Eleventh Year of the Reign of the Lord William the Third, now King of England, &c. Roll 377.

The Bishop of Salisbury against Phillips.

[3 Ld. Raym. Entries 451. S. C.]

Salk. 43. Carth. 65 THE lord the king hath given in charge to his be-505. Holt 52. 66 Tolved and faithful Sir George Treby, Knt. his Chief " Justice of the Bench, his writ closed in these words, to " wit, William the Third, by the grace of GOD, of " England, Scotland, France, and Ireland King, Defender " of the Faith, &c. To his beloved and faithful Sir "George Treby, Knt. his Chief Justice of the Bench, " greeting: Because in the record and proceedings, and Writ of error. " also in the giving of the judgment of the complaint which was in our Court before you and your brethren " our justices of the Bench aforesaid, by our writ be-46 tween William Phillips, executor of the will of William " Phillips, Gentleman, his father lately deceased, and Gilbert bishop of Salisbury and John Berrow clerk, to " the end that the same bishop and John should permit " him the faid William Phillips, the now plaintiff, to pre-" fent a fit person to the church of Stanton, otherwise Stanton Fitz-Warren, otherwise Stanton Fitz-Herbert, in "the county of Wilts, which was vacant, and did belong " to his gift, as it was faid, manifest error intervened, to " the great damage of them the faid bishop and John, 46 as we have been informed from his complaint, We " being willing that the error (if any was) should be in

" due manner corrected, and that full and speedy justice

" should be done to them the said bishop and John, in " this behalf, do command you, that if judgment be " thereupon given, then that you distinctly and plainly " fend the record and proceedings aforefaid with all " things to them belonging, unto us under your seal, and "this writ; fo that we may have them from the day of " Easter in five weeks wheresoever we shall then be in " England, that we having inspected the record and proceedings aforesaid, may cause to be done that which of " right and according to the law and custom of our kingdom of England is most fit to be done further there-" upon for correcting the error. Witness our self at "Westminster the twenty-sixth day of April in the eleventh " year of our reign.

Hale.

"The answer of Sir Geo. Treby, Knt. Chief Justice " within named.

"The record and proceedings of the complaint where-" of mention is within made, with all things concerning " the same, before the lord the king, wheresoever, &c. 46 at the day within mentioned, I fend in a certain record " to this writ annexed, as within I am commanded.

" Pleas involled at Westminster before Sir George Treby, " Knt. and his brethren, justices of our lord the king, of the Bench, of the term of the Holy Trinity in the "tenth year of the reign of our lord William the Third, " by the grace of God, of England, Scotland, France, and " Ireland King, Defender of the Faith, &c. Roll 1562.

"Wilts, to wit, Gilbert, bishop of Salisbury, and John Quare impedita Berrow, clerk, were summoned to answer William Phil- of William 66 lips, Gent. executor of the last will and testament of Phillips. " William Phillips, Gent. his father lately deceased, of a plea, that they permit him the faid William Phillips, " now plaintiff, to present a fit person to the church of " Stanton, otherwise Stanton Fitz-Warren, otherwise Stan-66 ton Fitz-Herbert, which is vacant [or void] and belongs to his gift, &c. And whereupon the fame William Declares upon an " Phillips, now plaintiff, by Dennis Ruffell his attorney agreement by in-" faith, That whereas one Richard Organ and one John jointenants to " Organ were seised as of see and right of the advowson present by turns " of the aforesaid church in gross, and being thereof so " seised, the aforesaid Richard Organ and John Organ on "the twenty-sixth day of June in the thirteenth year of the reign of James the First, late king of England, at

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# Pleadings to the Cales. \* tain indenture made between the faid Richard Organis

we by the name of Richard Organ of Lambern in the county of Berks, Gent. of the one part, and the said John Organ, by the name of John Organ of Stanton within the hundred of Highworth in the county of Wilts, Gent.

Profert of the

" of the other part, the other part whereof, sealed with " the seal of the said John Organ, the same William Phil-" lips now plaintiff brings here into Court, the date " whereof is on the same day and year concluded and agreed between themselves, that they the said Richard "Organ and John Organ should be thereupon seised in ec common, not jointly, of the advowson of the church aforesaid, that is to say, that the said Richard Organ " should stand and be seised, and have, hold, and enjoy " one moiety of the faid advowson to him and his heirs, " and that the faid John Organ should stand and be seised, and have, hold, and enjoy the other moiety of the faid advowson to him and his heirs; and that the said " Richard Organ and John Organ and their several heirs, es so often as the said church of Stanton should become " vacant [or void] feverally and respectively should pre-" fent by feveral turns one after another in manner and " form following, to wit, that the faid Richard Organ and 66 his heirs might present to the said church at the first " turn when the faid church should happen first and next " to be vacant [or void] for it; and that the said John "Organ and his heirs might present to the said church " when the same should then next be vacant [or void] "the second time; and so the said Richard Organ " and John Organ severally and their several and re-66 spective heirs, in their several turns alternately, as "the same church at any time thereafter should be-" come vacant [or void] should or might present their " clerks according to the order and course concluded and agreed upon as before is mentioned, as by the fame indenture amongst other things more fully apes pears; whereby the same Richard and John were " seised of the advowson aforesaid to be presented to the see fame church in form aforesaid; and being so seised thereof, the faid Richard Organ, after the making of the " faid indenture, beginning his first turn, and as in his

"first turn at Stanton aforesaid, presented to the said church, being vacant, one John Woodbridge his clerk, who at the presentation of the same Richard Organ was there admitted and instituted in the same, in time of peace, in the time of our lord James the First, late King of England. And afterwards the church aforesaid

" became vacant by the death of the faid John Woodbridge

" there, whereby the said John presented to the same

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First presenta-

Vacancy by death. Second prefentment.

church fo vacant [or void] as in the fecond turn, at Stanton aforesaid, Thomas Hotchkis his clerk, who at the or presentation of him the said John Organ was admitted " and instituted in the same, in time of peace, in the "time of our lord Charles the First, late King of Eng-" land; and the aforesaid Richard Organ and John Organ being so seised of the advowson aforesaid, the said 66 Richard Organ afterwards, at Stanton aforesaid, died see feised of such his estate, by and after whose death a 46 moiety of the advowson aforesaid descended to one Descent of one John Organ as brother and heir of the faid Richard " Organ, whereby the same John Organ the brother was see feiled of the moiety of the advowfon aforefaid as of " fee and right to present in form aforesaid; and being 66 fo seised thereof, afterwards, to wit, on the twenty-fifth "day of August in the fourteenth year of the reign of the faid late king Charles the First, by a certain inden- Another agreeture made between him the faid John Organ of the ment by indenone part, and one Richard Hippefley of Stone Easton in 66 the county of Somerset, Gentleman, nephew of the said " John Organ the brother, to wit, second son of Eliza-" beth Hippesley widow, natural sister of the said John " Organ the brother, of the other part, made at Stanton "aforesaid, in the county aforesaid, the other part where-" of, fealed with the feal of the faid John Organ the brother, the same William Phillips the now plaintisf " produces here in Court, the date whereof is the fame day and year last abovesaid; and in consideration of the Considerations 46 natural love and affection which he had and bore towards the faid Richard Hippefley, and in confideration " of the blood between them, and for the better preferment, advancement, maintenance, and livelihood of se the faid Richard Hippefley and his brother, in the same 66 indenture afterwards named, he the faid John Organ [760] sthe brother, for himself and his heirs, covenanted, se granted, and agreed to and with the said Richard Hipe pefley and his heirs, that he the faid John Organ the brother, his heirs and assigns, and every of them, so and all and every other person and persons and their " heirs, who then were or thereafter should stand and be see feifed of and in the faid moiety of the advowson afore-66 faid, should stand and be seised of the same, to the use Settled in tail to and behoof of the faid Richard Hippefley, and the heirs theuses declared. of the body of the faid Richard Hippefley lawfully to 66 be begotten; and for want of such issue, to the use so and behoof of Robert Hippofley, brother of the faid " Richard Hippefley, and the heirs of the body of the faid 66 Robert Hippelley, lawfully to be begotten; and for de-66 fault of such iffue, to the use and behoof of the said 46 John Organ the brother, and his heirs and assigns for Vol. II. " EVET !

" ever; and to no other uses, intents, or purposes what-66 foever, as by the faid indenture last mentioned more 66 fully appears; by virtue of which faid indenture, and 46 by force of a certain act, made and provided in the es parliament of our lord Henry the Eighth, late King of " England, held at Westminster in the county of Middle-" fex on the fourth day of February in the twenty-seventh 44 year of his reign, of transferring uses into possession, 46 the aforesaid Richard Hippefley was seised of a moiety of the advowson aforesaid, as of see tail and right belonging to the remainder thereof in form aforefaid, "to wit, to present in form aforefaid; and the said 66 Richard Hippefley being so seised thereof, afterwards, es at Stanton aforesaid, in the county aforesaid, died, by " and after whose death the said moiety of the advowon aforesaid descended to Richard Hippesley, Esq. as son " and heir of the body of the said Riebard Hippester, "whereby the same Richard Hippestry the son was seised of the faid moiety of the advowson aforesaid as of see-" tail and right: And the same Richard Hippestey the 66 fon being so seifed thereof, afterwards, at Stanton afore-" faid, died without iffue of his body, by and after whose ed death the faid moiety of the advowson aforesaid de-" scended to John Hippefley, Esq. as son and heir of the body of the faid Richard Hippefley first named, whereby " the faid John Hippeffey was feised of the faid moiety of " the advowson aforesaid as of see and right. And the " faid John Hippefley being so thereof seised, afterwards, to " wit, the fixteenth day of January, in the twenty-fourth " year of the reign of our lord Charles the Second, late "King of England, at Stanton aforefaid, in the county " aforclaid, by his certain writing, which the same Wil-" liam Phillips the now plaintiff produces here in court, fealed with the seal of the said John Hippelley, the date Grant of the next " of which is the same day and year, did give and grant avoidance to the ce to Francis Symes the elder of Kelmefest in the county of 66 Oxford, Gentleman, and William Phillips the testator of " Eaten Hastings in the county of Berks, Gentleman, his " executors and affignees, the first and next advowson, " donation, nomination, presentation, and free disposition " of the faid parish church of Stanton, otherwise called " Stanton Fitzkerbert, otherwise Stanton Fitzwarren, will-" ing, and by his same writing granting, that it should and " might be lawful to and for the said Francis Symes and " William Phillips the testator, their executors and assig-" nees, to present to the said church of Stanton Fitzherbert, otherwise Stanton Fitzwarren, whenfoever or howfoever by death, refignation, deprivation, cossion, permutation, "dismission, or any other way whatsoever, by which the " fame church should happen then first and next to be vaee carst

Symes, their ex:cutors and aftigns.

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cant [or void] any honest and learned clerk for the then ec next turn only, as by the writing aforefaid more fully 46 appears; by virtue of which grant the same Francis Symes and William Phillips the testator were possessed of the advowson of the church of Stanton aforesaid; "that is to say, to present to the same church, when first and next it should happen to be vacant; and being so 46 possessed thereof, the said Francis Symes, afterwards, at Francis Symes Stanton aforesaid, in the county aforesaid, died, and the one of the granfaid William Phillips the testator survived, and then was the plaintiff's possessed of the advowson aforesaid by right of survivor- testator survives. " ship, &c. And the said William Phillips the testator being so thereof possessed, the said church in the life-66 time of the said William Phillips the testator was vacant [or void] by the death of the faid Thomas Hotelesis, and still remains vacant [or void]; which said vacancy 66 [or avoidance] of the church aforesaid by the death of The vacancy in the aforesaid Thomas Hotchkis, is the first and next va. thetestator's life. cancy [or avoidance] of the faid church after the afore-44 faid grant to the same Francis Symes and William Phil-" lips by the said John Hippesley in form aforesaid made, " and for that reason it belonged to the said William Philif lips the testator in his lifetime, to present a sit person to "the church aforesaid so vacant [or void]; and the said bishop and John Berrow have unjustly hindered him the faid William Phillips the testator; and the said William \*\* Phillips the testator, the said church being so vacant [or void as aforefaid, afterwards, to wit, on the twenty-" first day of June in the fixth year of the reign of our " lord the now King, and of the lady Mary late Queen of England, &c., at Stanton aforesaid, in the county afore- Testater made faid, made his last will and testament, and by the same his will, and the 66 did constitute and ordain the said William Phillips the paintiff his exeow plaintiff, executor of his faid will, and afterwards "there died; after the death of which faid William Phil-66 lips the testator, the said William Phillips the now so plaintiff took upon himself the burthen and execution of the faid will, and that will hath proved in due form will proved. of law, to wit, at Stanton aforesaid, and for that reason at present it belongs to him the said William Phillips the 46 now plaintiff, to prefent a fit person to the said church " fo vacant [or void]: And the faid bishop and John Ber-" row do unjustly hinder him the faid William Phillips the on now plaintiff; wherefore the same William Phillips the 66 now plaintiff faith that he is injured, and has damage to "the value of fix hundred pounds: And therefore he " brings suit, &c. With this, that the said William Phil-" lips the now plaintiff will verify that the faid John Hippefley is still living and in full life, to wit, at Stanton 762] aforesaid, in the county aforesaid; and that the church Avers the life of 66 of the trantor and D d 2

the Latin of £.e... . . .

" of Stanton, otherwise Stanton Fitzwarren, otherwise 66 Stimure Thinkerhers, is one and the same church, and " not another nor different: And he brings here into " court the letters testamentary of the faid William Phil-" life the testator, by which it sufficiently appears to the "Court here, that he the faid William Phillips the now " plaintiff is executor of the faid will, and has admini-" ftration thereof, &c.

Pica onila istparimue.

" And the faid Gilbert bishop of Salifeury, and John " Berrene clerk, by John Carpenter their attorney, come " and defend the force and injury when, &c. And the " faid John Berrow faith, that he is parson imparsonce of the charch aforefaid by the collation of the faid bishop; " and the faid bishop and John Berrow further say, that

Almit the vacan y, and that after i'x menths she bithip prefrate . by imple.

the faid William Phillips the executor ought not to have " his faid action against them; because they fay, that the " faid church of Stanton, otherwife Stanton Fitzwarren, " otherwise Stanton Fitzberbert, was vacant [or void] by 44 the death of the faid Thomas Hotekkis on the twentieth " day of September in the year of our Lord one thousand 66 fix hundred ninety and three, and remained so vacant " until the twenty-third day of April in the year of our 66 Lord one thousand fix hundred ninety and four, on "which day at Sauter aforefaid the faid bishop, because " that at that time fix months after the vacancy for avoid-

" ance] of the same church were fully elapsed and de-" volved, being the ordinary of that place, collated the " faid John Berrow clerk to that church then being va-" cant, as it was lawful for him: And this they are ready " to verify: Wherefore they pray judiment if the faid "William the executor eight to have his faid action " against them, &c. And the said William Phillips the

Replies and adthe vacancy.

into the time of " executor faith, that he, notwithstanding any matters be-" fore alleged, eaght not to be precluded from having his " faid action, because he faith that well and true it is that " the aforesaid church of Stanton, otherwise Stanton Fitz-

" warren, otherwise Stanton Fitzkerkert, by the death of " the faid Thomas Hotchkis on the faid twentieth day of 46 September in the year of our Lord one thousand fix hunof dred ninety-three abovefaid, was vacant [or void] as the

" faid bishop and John Berrow in pleading have alleged: 66 But the fame William Phillips the executor further faith, " that after the faid twentieth day of September in the " year of our Lord one thousand fix hundred ninety and

" three abovefaid, and before the faid twenty-third day of " April in the year of our Lord one thousand fix hundred " ninety and four, within fix months after the death of the

" faid Thomas Hotchkis, to wit, on the fixteenth day of " Offiber in the year of our Lord one thousand fix hundred " nincts

But firs that within the fix monthly to all, minety and three, the faid William Phillips the testator, ter by writing by his writing sealed with his seal, the date of which is Symes, and requested for the same sixteenth day of October in the year of our quested the 66 Lord one thousand six hundred ninety and three, at bishop to admit Stanton aforesaid, in the county aforesaid, the said him, who re-66 bishop being then ordinary of the said place of Stanton, otherwise Stanton Fitzwarren, otherwise Stanton Fitz-66 herbert, presented one John Symes, master of arts, his clerk; and then and there requested the said bishop to admit and institute the same John Symes to the church 46 aforesaid so vacant by the death of the said Thomas " Hotchkis, which said John Symes the said bishop then and "there altogether refused to admit and institute to the 66 faid church, at the aforesaid presentation of the said William Phillips the testator, and hindered him the said 66 William Phillips the testator from presenting: And this 44 he is ready to verify: Wherefore he prays judgment 44 and damages by occasion of the hinderance [or impedies ment] aforefaid, and also a writ to the said bishop to " him to be adjudged, &c.

"And the faid bishop and John Berrow say, that well Rejoin and admit the present 46 and true it is, that the faid William Phillips the testa- tation, but say, 46 tor, by his writing fealed with his feal, did present the That J. Symes 66 faid John Symes, as the same William the executor hath and defired time above in his replication alleged: But the faid bishop and to prepar himfollower further say, that afterwards, and within self-forexaminafix months after the avoidance [or vacancy] of the faid tion, and never church, to wit, on the faid fixteenth day of October in "the year of our Lord one thousand six hundred ninety sand three abovefaid, the faid John Symes at Stanton foresaid brought the presentation aforesaid to the said \*6 bishop, and required the said bishop to give the said 46 John Symes a few days to prepare himself to be exa-46 mined concerning his fusficiency in learning to have "the church aforesaid; and that the said bishop there-46 upon, at the request of the said John Symes, then and there did give leave to the faid John Symes to go away, and there to return to the faid bishop within three 46 days next following, to be examined of his fufficiency 46 aforesaid, which said three days were ended long before the end of fix months after the vacancy [or avoidance] of the church aforesaid by the death of the said Thomas "Hotchkis, that is to fay, by the space of one month, to 46 wit, at Stanton aforesaid. And the said bishop and 46 John Berrow further say, that he the same bishop, for 66 the faid three days afterwards, was there ready to exa-" mine the faid John Symes concerning his fufficiency 46 aforesaid; and that the said John Symes, neither within 46 the faid three days, nor ever afterwards, did return or

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" offer himself to the said bishop to be examined concern-" ing his faid fufficiency; by which the faid church re-" mained void [or vacant] for the space of fix months and . " upwards after the aforefaid vacancy or avoidance by the " death of the faid Thomas Hotchkis; whereupon the faid " bishop collated the said John Berrow to the said church " fo vacant [or void]; which faid John Berrow was af-" terwards inducted into the same church in due form of " law, without this, that the faid bishop altogether re-" fused to admit and institute the said John Symes to the " church aforesaid at the presentation of the said William " Phillips the testator, as the said William Phillips the ex-" ecutor hath above alleged: And this they are ready to " verify: Wherefore they pray judgment, and that the 46 faid William the executor from his faid action be pre-" cluded, &c.

[ 764 ] Traveries his re fufal to admit J. Symes.

Surrejoinder and iffue upon the traverse.

"And the said William Phillips the executor, as before saith, That the said bishop hath altogether refused to admit and institute the said John Symes to the church aforesaid, at the presentation of the said William Phillips the executor lips the testator, as the said William Phillips the executor hath above in his replication thereupon alleged: And they pray that this may be inquired of by the country:
And the said bishop and John Berrow likewise, &c.

come here in three weeks from the day of the Holy Trinity, twelve, &c., by whom, &c., and who neither, &c.,
to recognize, &c., because as well, &c. At which day
the parties come here, &c. And the sheriff hath not
returned the writ: Therefore, as before, the sheriff is

Continuances by non mif. breve.

" the parties come here, &c. And the theriff hath not " returned the writ: Therefore, as before, the sheriff is " commanded, that he cause to come here in three weeks " from the day of St. Michael, twelve, &c., to recognize in form aforesaid, &c. At which day the parties come " here, &c., and the sheriff hath not returned the writ: "Therefore, as before, the sheriff is commanded, that he " cause to come here in eight days from the day of the " Purification of the Bleffed Mary, twelve, &c., to re-" cognize in form aforefaid, &c. At which day the jury " between the faid parties of the aforefaid plea was re-" fpited thereon between them here until this day, to wit, in fifteen days from the day of Easter then next following, unless the justices of our lord the king appointed to take the affizes in the county aforefaid, by the form of " the statute, &c., first come on Saturday the eleventh day of March past, at New Sarum in the county aforesaid; " and now here at this day comes the faid William by his " faid attorney, and the faid justices appointed to take af-" fizes, before, &c., have fent here their record in these words, to wit, Afterwards at the day and place within " contained,

contained, before Sir Thomas Rokeby, Knt. one of the Return of the inflices of our lord the king appointed to hold pleas be- poffea. fore the king himself, and Sir John Powell, Kut. one of 46 the justices of the said lord the king of the bench, juset tices of the faid lord the king, appointed to take affizes "in the county of Wilts, by form of the statute, &c., came as well the within named William Phillips, Gent. " executor of the last will and testament of William Phil-" lips, Gent. his father lately deceased, as the within-" named Gilbert Bishop of Salisbury, and John Berrow clerk, by their attornies within mentioned: And the Find that the jurors of the jury, whereof mention is within made, admit upon the being fummoned, likewise came, who being elected, plaintiff's pretried, and sworn to speak the truth of the within confentation; and tents, upon their oath, say, that the said Gilbert Bishop the church full upon the bishop's of Salifbury, altogether refused to admit and institute collation, and 66 the within-named John Symes to the church within the yearly value mentioned on presentation of the said William Phillips 1201. the testator, as the said William Phillips the executor hath within thereupon in his replication alleged. And 66 the faid jurors upon their oath further fay, that the " church aforesaid is sull of the said John Berrow by the collation of the said Gilbert Bishop of Salisbury, as is by " him within alleged, and that the church aforesaid is, " and from the time in which, &c., was of the yearly value of one hundred and twenty pounds in all issues 66 beyond reprifals: And the jurors aforesaid assess the da-" mages of the faid William Phillips the executor, for his " costs and charges by him concerning his fuit in this be-" half applied, to forty shillings; therefore no respect being had to the beforefaid forty shillings of the damages, costs, and charges aforesaid, assessed by the said jury by " occasion of the hinderance aforesaid, because such dae mages by the law of the land are in nowife in this cafe. to be adjudged; it is confidered that the faid William Judgment and 46 Phillips the executor do recover against the said Bishop awarding a write of Salifbury and John Berrow, his presentation to the to the oilhop. "church aforefaid, and his damages to the value of that " church for the half of one year, which amounts to fixtyounds, by the jury aforesaid in form aforesaid affessed; and let him have a writ to the Archbishop of Canterbury, Primate of all England, and Metropolitan of that es place, for that the said Bishop of Salisbury is a party, 66 &c., because the said John Berrow is admitted and in-66 stituted to the same church at the collation of the said "Bishop of Salisbury, and is inducted in the same, to re-" move the faid John Berrow from the faid church, and " that he may admit a fit person to the said church at the or presentation of the said William Phillips the executor; Dd 4

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Mifericordia.

"and the aforesaid Bishop of Salisbury and John Berrows
in mercy, &c. Afterwards, to wit, on Monday next
after three weeks from the day of St. Michael in this
fame term, before our lord the king at Westminster,
come the aforesaid bishop and John Berrow by Adrian
Monta their atterney, and for that in the record and

Errors affigned.

" Moore their attorney, and say, that in the record and or proceedings aforefaid, and also in the giving of the judg-" ment aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears that the said judges ment given in form aforesaid was given for the said William Phillips against the said bishop and John Ber-46 row, where by the law of the land of this kingdom of 66 England, that judgment ought to have been given for " the faid bishop and John Berrow against the same Wil-" liam Phillips, therefore in that there is manifest error: "There is also error in this, to wit, that the record afore-66 said before the lord the king now here sent is defective " in this, to wit, that the original writ, and the return of "the same between the parties aforesaid in the plea afore-" faid, are totally omitted out of the faid record, and yet " remain in the custody of the keeper of the writs of the " lord the now king of the bench, not certified to the same of lord the king. And the same bishop and John Berrow or pray a writ of the faid lord the now king to be directed.

Certiorari.

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46 to the keeper of the writs of our faid lord the now king. of the bench aforefaid, to certify the writ aforefaid, to-66 gether with the return of the fame writ to the faid lord "the king: And it is granted to them, &c., whereby it " is given in charge to William Thursby, Esq. keeper of "the writs of our lord the king of the bench aforefaid, "that having fearched for the original writs in the county " of Wilts, of the term of the Holy Trinity in the eighth " year of the reign of our faid lord the now king, being " in his custody of record, he may send what he shall find "in the fame concerning the aforefaid writ, together "with the whole return of the same writ, as fully and " entirely as they remain in his custody, to the lord the " king, without delay, wherefoever, &c., together with 66 the writ of the faid lord the king, to himself thereupon " directed, &c. Which faid keeper of writs, by virtue of so that writ to him thereupon directed, hath certified to " the fame lord the king, that having fearched all the ori-" ginal writs of his county of Wilts, of the faid term of "the Hely Trinity in the eighth year of his reign, in his " cuttody filed of record, he hath a certain original writ 66 between the parties aforefaid of the plea aforefaid in " his cuitody filed of the fame term, the tenor of which 66 faid writ, together with the return of the same, folco loweth in these words: William the Third, by the grace

Quare impedit

' of

# Pleadings to the Cases.

6 of GOD, of England, Scotland, France, and Ireland 46 King, Defender of the Faith, &c. To the sheriff of " Wilts, greeting: Command Gilbert Bishop of Salif-" bury, and John Berrow clerk, that justly and without "delay, they permit William Phillips, executor of the will " of William Phillips his father lately deceased, to present " a fit person to the church of Stanton, which is vacant for void], and belongs to his gift, as he faith, and whereof "he complains that the faid bishop and John do unjustly hinder him: And unless they shall so do, and the said executor shall make you secure of prosecuting his claim, then fummon by good fummoners the aforefaid bishop and John, that they be before our justices at Westminster, 66 from the day of the Holy Trinity in fifteen days, to shew 66 wherefore they have not fo done. And have you there the fummoners and this writ. Witness, Thomas Arch-66 bishop of Canterbury, and the rest of the keepers and 55 justices of the realm at Westminster, the twenty-eighth " day of May in the eighth year of our reign. Hale. Effoin for the bishop adjourned until three weeks from "the day of Saint Michael; the fame day for the clerk " of essoin for the clerk adjourned until the morrow of " Saint Martin; the same day for the bishop William "Hall. Pledges of prosecuting, John Doe and Richard Roe; summoners, Thomas Eyre, Joseph Russel, Edward Somner, Esq. sheriff; which said writ of certiorari, toge-"ther with the return thereof, is assiled amongst the records without day of that term: And upon this the said William Phillips, by Joseph Sherwood his attorney, likethe faid bishop and John Berrow (as before) say, that in "the record and proceedings aforefaid, and also in the siving of the judgment aforesaid, there is manifest er-" ror, alleging the errors aforefaid by them in form afore-" faid above alleged, and pray that the judgment afore-" faid, for the aforefaid and other errors being in the re-" cord and proceedings aforefaid, may be reverfed, annul-66 led, and altogether deemed as none; and that they be " restored to all things which by occasion of the judg-" ment aforesaid they have lost; and that the Court of " the faid lord the king now here proceed to the examinstion as well of the record and proceedings aforesaid, as " of the faid matters above affigned for error, and that the " faid William do rejoin to the errors aforefaid: Upon which the same William Phillips saith, that there is no " error either in the record and proceedings aforefaid, or " in the giving of the judgment: And in like manner " prayeth that the Court of the faid lord the king now " here do proceed to the examination as well of the re-

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udgment af

" cord

ecord and proceedings aforefaid, as of the faid matters " above assigned for error; and that the said judgment in " all things be affirmed: But because the Court of the " faid lord the king now here are not yet advised of giv-" ing their judgment of and concerning the premifes, day " is thereupon given to the parties aforefaid, before the " lord the king, until

wherefoever. &c. " of hearing their judgment thereupon, for that the Court " of the faid lord the king now here thereof are not yet," IJ۲.

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael in the Third Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 144.

## Goddard against Smith and another.

" liege man and subject of the said lady the now queen, " being without any scandal, imputation, or reproach, " and hath not behaved or demeaned himself at any time " from the time of his nativity hitherto as a barretor or "disturber of the peace of the said lady the queen, nor 46 was in suspicion of the like crime amongst his neigh-

" bours

Salk. 21. 6 Mod. Middlefex, "BE it remembered, That heretofore, that is to fay, in the term of the Holy Tri-245. Rep. A.O. to wit, is to lay, in the term of the Holy Vri-36. Holt 497. "nity last past, before our lady the queen at Westminster, 5. C. "came Richard Goddard by Henry Wright his attorney, and " came Richard Goddard by Henry Wright his attorney, and brought into the Court of our faid lady the queen then " there his certain bill against Richard Smith and Christo-" pher Presson in the custody of the marshal, &c. of a plea of trespass upon the case; and there are pledges " of profecuting, namely, John Doe and Richard Roe; which faid bill followeth in these words, that is to say, " Middlefex, to wit, Richard Goddard complains of Richard [ 768 ] " Smith and Christopher Preson in the custody of the " marshal of the Marsballen of our lady the queen, be-" fore the queen herfelf being, for that, to wit, That " whereas the faid Richard Goddard is a good, true, faith-" ful, peaceable, and honest subject, and liege man of " our lady the now queen, and was of a good name, fame, barretry, where- 66 reputation, conversation, behaviour, and condition, " and as a good, true, faithful, peaceable, and honest

Declaration in esse on conspiracy for a faile and malicious indictment of of he was acquitted.

66 bours and other subjects of the said lady the queen to whom the faid Richard Goddard was known, and by « reason of his honest and quiet conversation aforesaid " for the whole time aforesaid, lawfully and honestly " gained and acquired great credit and esteem, and also divers great gains and profits from his neighbours and other subjects of our said lady the queen, with whom " the faid Richard Goddard had commerce for the supcoport of himself and his family: Nevertheless the said « Richard Smith and Christopher, not ignorant of the pree mises, but contriving and maliciously intending not 66 only to deprive him the faid Richard Goddard of his co good name, fame, and esteem aforesaid, but also to 66 bring him the faid Richard Goddard into ignominy and so public difgrace, that by reason thereof the subjects of the faid lady the queen might withdraw themselves 66 from the fellowship of him the said Richard Goddard, and might altogether cease and delist from dealing and 44 having commerce with him in any manner, on the "thirteenth day of September in the first year of the reign of the said lady Anne, now queen of England, Er. 66 at the parish of St. James Clerkenwell in the county 44 aforesaid, then and there having had a conspiracy be-46 tween themselves falsely and maliciously to cause the " faid Richard Goddard to be indicted as a barretor and ec public disturber of the peace of the said lady the queen, without any cause or colour of such crime being com-" mitted by him the faid Richard Goddard, they the same " R. Smith and Christopher at the parish aforesaid in the county aforefaid, in profecution and execution of their "malicious intention and conspiracy aforesaid, at the " general quarter fessions of the peace of our lady the " queen held for the county of Middlefex at Hicks's Hall Indictment at in St. John-street in the county aforesaid, before John Hicks's Hall. " Bennet, Henry Hawley, and Joseph Offley, Esquires, and "other their fellow justices of the said lady the queen, "appointed to keep the peace in the county aforesaid, " and also to hear and determine divers felonies, tref-" passes, contempts, and misdemeanors in the same coun-"ty committed, falfely and maliciously caused and pro-" cured the said Richard Goddard, with intent to defame " the same Richard Goddard, without any lawful or true " cause, to be indicted by the name of Richard Goddard, " late of the parish of St. James Clerkenwell in the county of Middlesex, yeoman, for that the same Richard God-" dard, on the first day of January in the first year " abovefaid, and divers other days and times as well " before as afterwards, at the parish aforesaid in the " county aforesaid, had been and then was a common " barretor,

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" barretor, and a common, daily, and public diffurber of 44 the peace of the faid lady the now queen, and also a 66 common and turbulent flanderer and fower of quarrels 44 and discords amongst his quiet and honest neighbours, so fo that he moved, procured, and stirred up divers con-46 tentions and controversies, and also brawlings, quarrels, " and fights, at the parish aforesaid in the county afore-" faid, and elsewhere in the faid county of Middlesex, amongst divers liege subjects of the said lady the queen, "to the great disturbance of the peace of the said lady the now queen, to the evil example of all others in the " like case offending, and against the peace of the said the now queen, her crown and dignity, &c. and ed did falfely and maliciously profecute and cause to be or profecuted the faid indictment against the faid Richard "Goddard, until the faid lady the now queen caused that si indictment afterwards for certain reasons to come to Removed by cer- " be determined before her: And the sheriff of the county aforesaid was commanded that he should not " omit, &c. but cause him to come and answer, &c. 66 And he the said Richard Goddard afterwards, to wit, in the term of St. Michael in the second year of the " reign of the faid lady the now queen, in the Court of " our lady the queen, before the queen herfelf, the fame <sup>66</sup> Court being at Westminster, was according to the law 46 and custom of this kingdom of England in a due and " lawful manner thereof discharged. By pretence of which said premises against him the said Richard God-66 dard, by the said Richard Smith and Christopher Preston 66 in form aforefaid published, done, exhibited, and profecuted, the same Richard Goddard is not only very much " hurt and injured in his good name, fame, credit, and ef reputation aforefaid, and disquieted and weakened in 46 his body, but was also forced to expend and lay out "divers large fums of money in and about acquitting and 46 discharging himself of the said indictment, and defend-" ing his innocence, to the very great discredit and extreme " impoverishment of him the said Richard Goddard, and "to the damage of the faid Richard Goddard of twenty " pounds: And thereupon he brings suit, &c. "And now at this day, to wit, Monday next after "three weeks from the day of St. Michael in this same " term, till which day the faid Richard Smith and Chrif-" topher had leave to imparle to the faid bill, and then to

" answer, &c. before our lady the queen at Westminster " comes as well the faid Richard by his faid attorney, as " the faid Richard Smith and Christopher by Edmund " Butler their attorney: And the said Richard and Chrif-

tiorari.

Discharged

" topber defend the force and injury, when, &c. and fay er that that they are in no manner guilty of the premises above laid to their charge, as the faid Richard Goddard above complains against them: And of this they put themsee felves upon the country; and the faid Richard Goddard 66 likewise, &c. Therefore let a jury come thereupon before our lady the queen at Westminster, on Monday " next after the morrow of All Souls, and who neither, " &c. to recognize, &c. because as well, &c. The same ed day is given to the parties aforesaid there," &c.

Pleas before our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 211.

Tenant against Gouldwin.

[3 Ld. Raym. Entries 485. S. C.]

Middlesex, "BE it remembered, That heretosore, that Salk. 21, 360. to wit, "BE is to say, in the term of Easter last past, 6 Mod. 311. before our lady the queen at Westminster, came Robert Holt 500. S. C. "Tenant by John Rice his attorney, and brought into the court of our faid lady the queen then there his certain 66 bill against Luke Gouldwin, in custody of the marshal, " &c., of a plea of trespass upon the case; and there are of pledges of profecuting, namely, John Doe and Richard " Roe; which faid bill followeth in these words, that is Case for not reto fay, Middlesex, to wit, Robert Tenant complains of tion wall, whereLuke Gouldwin in the custody of the marshal of the by the plaintiff Marsbalsea of our lady the queen, before the queen her- was prejudiced. "felf being, for that, to wit, That whereas he the faid "Robert, on the first day of October in the first year of " our lady Anne, now queen of England, &c., and from "thence always hitherto was possessed and still is possessed " of one meffuage, fituate, lying, and being in Frith-" fireet in the parish of St. Anne within the liberty of "Westminster in the said county of Middlesex, for a cer-46 tain term of years not yet ended, and used to lay and 46 keep in his cellar, parcel of his messuage aforesaid, good " stores of coals and ale for the use of his family, and also 66 to be fold and merchandized to divers persons who "were wont to buy that commodity in his meiluage 46 aforesaid, to the great prosit and advantage of him the " faid

" faid Robert, which faid cellar lies contiguous, and for 46 all the time aforefaid did lie contiguous to a meffuage " of the faid Luke in the parish aforesaid, and used to be

" separated and fenced from a privy-house, parcel of the so aforesaid messuage of the said Luke, by a thick and close

771 Averment of the ufige.

Breach

44 wall which belongeth to the faid meffuage of the faid 46 Luke, and of right ought to have been repaired by the " faid Luke for the whole time aforefaid: Neverthelels 46 the faid Luke not being ignorant of the premises, but

" contriving and fraudulently intending him the faid Ro-" bert in this behalf unjustly to aggrieve, and wholly to " deprive him the faid Robert of the use and advantage of

" the cellar of his meffuage aforefaid, and to hinder him of the profit of his commerce aforefaid, on the same " first day of October in the above-said year of the reign of

"the faid lady the queen, and from thence always hitherto, 66 fo negligently kept and repaired the faid wall, although

" often requested to repair the same, to wit, by the said "Robert, on the same first day of October in the parish

" aforesaid, that for want of due care and reparation of 66 the same wall, the filthinesses and nasty things of the

" faid privy-house flowed out of the same privy-house by "the decayed parts and breaches of the wall aforefaid into

" the cellar aforesaid of the same Robert, and overflowed

"the same cellar, to wit, in the parish aforesaid, for the " whole time aforefaid; whereby the same Robert lost the

" use of his cellar, and the profit of his commerce afore-

Plaintiff damni- " faid, for all the time aforesaid: Wherefore the same " Robert faith, that he is injured and hath damage to the

" value of one hundred pounds: And thereupon he brings

" suit, &c. And now at this day, to wit, Friday next

" after the morrow of the Holy Trinity in this same term,

" until which day the faid Luke had leave to imparle to "the faid bill, and then to answer, &c. before our lady

"the queen at Westminster comes the aforesaid Robert by

" his faid attorney, and prays that the faid Luke may an-

" fwer to the declaration: And the faid Luke, although

" on the same day solemnly required, doth not come nor

" fay any thing in bar or preclusion of the aforesaid action

Julgment by nil " of the faid Robert; whereby the same Robert remains

46 against him thereupon undefended, for which reason

" the faid Robert ought to recover his damages against the

" faid Luke: But because it is not known by the Court of

66 the faid lady the queen now here before the queen her-

" felf, what damages the faid Robert hath fustained by

occasion of the premises in this behalf: Therefore the " sheriff is commanded, that he, by the oath of twelve

"honest and legal men of his bailiwick, do diligently in-

44 quire what damages the faid Robert hath sustained, as .. well

well by occasion of the premises, as for his costs and charges by him about his suit in this behalf applied; and that he send the inquisition which he shall take thereon to our lady the queen at Westminster on Monday next after three weeks from the day of St. Michael, under his seal and the seals of those by the oath of whom he shall take the said inquisition, together with the writ of our lady the queen to him for that purpose directed:

The same day is given to the said Robert there," &c.

Pleas before our Lady the Queen at Westminster, of the Term of St. Hilary in the Third Year of the Reign of our Lady Anne, now Queen of England, &cc. Roll 102. [77<sup>2</sup>]

## Brook against Hustler.

England, " OUR lady the queen hath fent to her trusty Salk. 56. Rep. to wit, " and well-beloved Sir Thomas Trevor, A. Q. 76. S. C. 66 Knt., her Chief Justice of the Bench, her writ closed in "these words, to wit, Anne, by the grace of GOD, of England, Scotland, France, and Ireland Queen, Desender of the Faith, &c. To her trusty and well-beloved Sir "Thomas Trevor, Knt., her Chief Justice of the Bench, es greeting: For as much as in the record and proceedes ings, and also in the giving of judgment of the plaint "which was in our court before you and your brethren, our justices of the Bench, by our writ between Sir William Huftler, Sir Richard Ofbaldeston, Knts., and William Ofbaldeston, Efq., and Thomas Brook late of Overes floction in the county of York, yeoman, of a debt of se-46 venty and nine shillings and eleven pence, which the " same William, Richard, and William demand of the said "Thomas, as it is faid, manifest error hath intervened, to so the great damage of the same Thomas, as we are in-66 formed by his complaint; We willing that the error, 66 if any was, be duly amended, and that full and speedy "justice be done to the parties aforesaid in this behalf, do 66 command you, that if judgment be thereupon given, then you fend to us diffinctly and plainly, under your 66 feal, the record and proceedings aforefaid, with all "things touching the same, and this writ; so that we may have them from the day of Easter in fifteen days where-" soever we shall then be in England, that we having in-" spected

fpected the record and proceedings aforesaid, may cause further to be done thereupon for amending the said error, that which of right and according to the law and custom of our kingdom of England shall be meet to be done. Witness ourself at Westminster the second day of March in the second year of our reign.

"The answer of Sir Thomas Trevor, Knt., Chief Justice within-named. The record and proceedings of the plaint within mentioned, with all things touching the fame, I fend before our lady the queen, wherefoever, & &c., at the day within contained in a certain record to this writ annexed, as I am within commanded.

Thomas Trever.

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\*\* Pleas inrolled at Westminster before Sir Thomas Trevor, Knt., and his fellow-justices of our lady the queen
of the Common Bench, of the term of St. Hilary in the
fecond year of the reign of our lady Anne, by the grace
of GOD, of England, Scotland, France, and Ireland
Queen, Defender of the Faith, &c. Roll 1228.

Declaration for an amerciament in a court-leet. Seifin of King James P. in a court-leet.

"Yorkshire, to wit, Thomas Brook, late of Overstocton in "the county aforefaid, yeoman, was fummoned to answer " Sir William Hustler, Knt., Sir Richard Ofbaldeston, Knt, " and William Ojbaldeslon, Esq., of a plea that he render "to them seventy and nine shillings and eleven pence, " which he owes to them and unjustly detains, &c. And " whereupon the same Sir William Hustler, Sir Richard " and William Ofbaldeston, by Robert Hopkinson their at-torney, say, that our lord James the First, late King of " England, was seised in right of his crown of England as " of fee and right of and in the court-leet and view of frank-pledge with the appurtenances, and all and every "thing which to a court-leet or view of frank-pledge be-" longed, or in any manner appertained, or ought to be-" long or appertain, within the manors or lordships, vil-16 lages or hamlets of West Bretton, Carutborn, Overflotton, and Netherflocton, in the faid county of York, and within "the precincts of the same manors or lordships, villages " and hamlets, and every of them, in the faid county of " York, being or not being parcel of the duchy of Lan-" cafter, of all refident and inhabiting within the manor " or lordship, village and hamlet beforefaid, and within " the precincts of the same manors or lordships, villages " and hamlets, and every or any of them. The faid " court-leet and view of frank-pledge aforefaid to be 46 holden twice by the year within the manors or lord-" ships, villages and hamlets aforefaid, or any of them, or within the precincts of the same manors or lord-

66 ships, villages and hamlets, or any of them, at such days 46 and times in the year as the faid lord King James the "First, his heirs or assigns, should see fit, convenient, and or necessary, according to the law and custom of this king-66 dom of England, before the steward of the same lord the king of that court, or the deputy of fuch steward for 66 the time being: And being so feised, the late King Grant thereof to "Jomes the First afterwards, by his letters patent under former the First atterwards, by his letters patent under the Great Seal of England, and under the seal of the dechy der the duchy 46 duchy of Lancaster in like manner made, bearing date seal. at Westminster in the county of Middlesex on the twenty-ninth day of June in the thirteenth year of his reign in England, and the forty-eighth in Scotland, which the se said Sir William Huftler, Sir Richard and William Ofbaldeston here in court produce, as well for and in consi fideration of the fum of twenty shillings of lawful mo-" ney of England, well and truly to be paid at the receipt of his Exchequer at Westminster to his own use, by his " beloved subject George Wentworth of Bulkliffe in West " Bretton in the county of York, Gent., whereof the same " late lord the king did acknowledge himself to be fully s fatisfied and paid, as for divers other good causes and confiderations the fame lord the king especially moving, " of his especial grace and certain knowledge and mere "motion did give and grant for himself, his heirs and " fuccessors, to the faid George Wentworth, his heirs and " assigns for ever, that they should and might have, hold, " and enjoy within the manors or lordships, villages, or the hamlets of West Bretton, Cawthorn, Overstotton, and 66 Netherflocton, and every of them, in the faid county of " York, and within the precincts of the same manors or " lordships, villages and hamlets, and every of them, in " the faid county of York, being or not being parcel of " the faid duchy of Lancaster, a court-leet and view of " frank-pledge, to be held of all the residents and inha-66 bitants, and other residents coming within the lordships or manors, villages and hamlets aforefaid, and within " the precincts of the same manors or lordships, villages " and hamlets, and every or any of them; to hold the To be held twice es faid court-leet and view of frank-pledge twice by the a yea, at such veur from time to time within the manors or lordships, grantee should villages and hamlets aforefaid, or any of them, or within think fit " the precincts of the same manors or lordships, villages " and hamlets, or any of them, at the fame places, days, " and times at which the faid George Wentworth, his heirs " or assigns, should see fit, convenient, and necessary, ac-" cording to the law and custom of this kingdom of Eng-" land, before the steward of the same G. Wentevorth, his 66 heirs and assigns for the time being, or before the de-Vol. II. " puty

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of puty of fuch steward for the time being; and all and whatfocver to the faid court-leet or view of frank-pledge 66 belonged, or in anywife appertained, or in any manner

Grantee seised and held feveral courts, and died.

Difcent to his fon and heir who was feiled.

And died without iffue, whereed to his bro-

Who died also without iffue, whereby they defeended to his brother.

"ought to belong or appertain, and also all and singular 46 amerciaments, fines, forfeitures, pains, penalties, per-44 quisites, profits, liberties, pre-eminences, privileges, " rights, and jurisdictions whatsoever, which at the said " courts-leet or view of frank-pledge to the faid lord the king, or his fuccessors, in any manner whatsoever might " or ought to belong; by virtue of which faid letters patent the faid George Wentworth was scised as of see and " right of and in the court-leet and view of frank-pledge " aforefaid, with the appurtenances; and held divers courts and views of frank-pledge within the manors or " lordships, villages or hamlets of West Bretton, Cawthorn, " Overflocton, and Netherflocton aforelaid, according to the " gift and grant aforesaid in the letters patent contained: 44 And the faid George being so seised of the court-leet and view of frank-pledge aforefaid, with the appurtenances, " afterwards, to wit, on the second day of June in the year of our Lord one thousand fix hundred and thirty-" eight, at Netherfloston aforefaid died, after whose death "the faid court-leet and view of frank-pledge, with the " appurtenances, did descend to William Wentworth, " Gent., as fon and heir of the said George, whereby the by they descend. " said William Wentworth, son and heir of the said George, " was feifed as of fee and right of and in the court-leet \* [ 775 ] " and view of frank-pledge aforesaid, with the appurte-nances; and being so seised thereof, the same William " afterwards, to wit, on the fourth day of March in the " year of our Lord one thousand six hundred and thirty-" nine, at Netberflocton aforefaid, died without any islue of his body; after whose death the said court-leet and view of trank-pledge, with the appurtenances, descended " to Thomas Wentworth, Efq., afterwards Sir Thomas " Wentworth, Baronet, as brother and heir of the faid " William Wentworth, whereby the faid Thomas Went-66 sworth, as brother and heir of the faid William Went-" worth, was seised of and in the court-leet and view of " frank-pledge aforesaid, with the appurtenances as of see " and right; and being so seised thereof, the said Sir Tho-" mus afterwards, to wit, on the first day of April, in the " year of our Lord one thousand six hundred and seventy-" fix, at Netherflotton aforesaid died, without any issue of " his body issuing; after whose death the said court-leet " and view of frank-pledge, with the appurtenances, did " descend to Sir Matthew Wentworth, Baronet, as bro-" ther and heir of the faid Sir Thomas Wentworth, where-" by the faid Matthew, as brother and heir of the faid Sir " Thomas " Thomas Wentworth, was seised of and in the court-leet 46 and view of frank-pledge aforefaid, with the appurte-" nances, as of fee and right; and being fo feifed thereof, the same Sir Matthew afterwards, to wit, on the second day of August in the year of our Lord one thousand six " hundred and seventy-eight, at Netherstocton aforesaid died; after whose death the said court-leet and view of Aster whose frank-pledge with the appurtenances descended to Sir seeded to his " Matthew Wentworth, Baronet, as son and heir of the son, who enterfaid Sir Matthew Wentworth the brother, whereby the ed. se said Sir Matthew Wentworth the son was seised of and " in the court-leet and view of frank-pledge aforesaid, with the appurtenances, as of fee and right: And the " faid Sir Matthew the fon being so seised thereof, afterwards, to wit, on the eighth day of December in the year of our Lord one thousand fix hundred and ninety-three, And by lease " at Netherflocton aforesaid, by a certain indenture of bar- and release con-"gain and fale made between the faid Sir Matthew Went- veyed to the plaintiffs. " worth the fon, of the one part, and the faid Sir William " Hustler, Six Richard Ofbaldeston, and William Ofbaldeston, of the other part, the other part whereof sealed with the 66 feal of him the faid Sir Matthew the fon, the same Sir William, Sir Richard and William Ofbaldeston, produce here in court, the date of which is the same day and " year, in confideration of five shillings to him in hand es paid by the faid Sir William, Sir Richard and William " Ofbaldefton, bargained and fold to them the faid Sir Wil-66 liam, Sir Richard and William, the faid court-leet and " view of frank-pledge with the appurtenances, to have " and to hold to the same Sir William Hustler, Sir Rich-" ard and William Ofbaldeston, their executors, admini-" flrators, and affigns, from the day of the date of the faid " indenture to the end and term of one year then next " following, and fully to be complete and ended: By vir-" tue of which faid bargain and fale, and by force of the 66 statute in that behalf made and provided of transferring uses into possession, the same Sir William Hustler, Sir " Richard and William Ofbaldeston, were in the possession of the court-lect and view of frank-pledge aforefaid for st that term; and being thereof so possessed, and the said " Sir Matthew Wentworth the fon being seised of the re-" version of the court-leet and view of frank-pledge afore-" faid, with the appurtenances, as of fee and right, after-" wards, to wit, on the ninth day of December, in the year of our Lord one thousand six hundred and ninety-three " abovefaid, at Netherflotton aforefaid, by a certain other " indenture made between him the faid Sir Matthew " Wentworth the son, of the one part, and the said Sir " William Huftler, Sir Richard Ofbaldefton, and William " Osbaldeston, E e 2

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66 Ofbaldeston, of the other part, the other part whereof " sealed with the seal of the faid Sir Matthew the fon, "the same Sir William Hustler, Sir Richard and William " Ofbaldefton produce here in court, the date whereof is the fame day and year last above mentioned, he the faid " Sir Matthew Wentworth the son, released to the same "William Huftler, Six Richard and William Ofbaldefton, "their heirs and assigns, all the estate, right, title, and " interest of him the said Sir Matthew Wentworth the fon, of and in the court-leet and view of frank-pledge Plaintiffs feifed. " aforefaid, with the appurtenances: By virtue of which " premises the said Sir William Hustler, Sir Richard and "William Ofkaldefton were and still are seised of and in "the court-leet and view of frank-pledge aforesaid, with " the appurtenances, as of fee and right; and that Thomas " Brooke, on the twenty-fourth day of April in the year " of our Lord one thousand seven hundred and three, and " long before, was resident and an inhabitant at Over-" floston aforesaid, within the jurisdiction of the leet and "view of frank-pledge aforefaid, and ought to do fuit at "the court of view of frank-pledge aforesaid: And they 44 the faid Sir William Huftler, Sir Richard and William 66 O/baldeston, being so as aforesaid seised of the court-leet 46 and view of frank-pledge aforefaid, with the appurte-66 nances, the court-leet and view of frank-pledge afore-

Defendant an inhabitant within the jurisdiction

of the leet, and

owed fuit.

Cour held April 66 faid was held at Netherflocton aforefaid within the manors 27, 17:30

to the inhabitants.

default in not appearing, wherefore the jury presented him.

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And he was amerced by the Court and affeer-

44 and lordships aforesaid the said twenty-fourth day of 46 April in the year of our Lord one thousand seven hundred and three, before Richard Witton, Efq., fleward of " the faid Sir William Huftler, Sir Richard and William " Ofbaldeflon, of that court, of which court fo to be held Notice was given 46 due notice was given to the residents and inhabitants " within the manors, lordships, villages, and hamlets 46 aforesaid, to wit, at Netherstoon aforesaid; and that 66 the faid Thomas Brooke did not do his fuit nor appear at Defendant made se that court, but made default; wherefore at the same se court, by the jurors who were fworn and charged in 46 the same court to inquire and present those things 46 which appertained to the faid court-leet and view of see frank-pledge, it was presented upon their oath, that the si faid Thomas Brooke then was resident and an inhabitant within the manors aforesaid, and within the jurisdic-"tion of the court of view of frank-pledge aforefaid, and 46 ought to have done fuit to the court of view of frankof pledge aforefaid: And that the faid Thomas Brocke, although he was then folemnly fummoned, did not appear but made default, by reason whereof the same Thomas 66 Brooke was then and there by the same Court amerced, " which faid amercement, by Joseph Senior and Timothy

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Roads then residents and inhabitants within the manors ed by two affect-
aforesaid, then and there chosen and sworn affeerors by ors, chosen and sworn affeerors by fwoin, at 19s.
the same Court, was then in due manner affected to 11 d., of which
thirty-nine shillings and eleven pence of lawful money he had notice.
of England; whereof the faid Thomas Brooke after- By which their section accrued
" wards, to wit, the day and year last mentioned, at Ne- to the plaintiffe.
" therflotton aforesaid, had notice, whereby an action ac-
erued to the same Sir William Huftler, Sir Richard and
" William Osbaldeston, to demand and have of the said
"I homas Brooke the faid thirty-nine shillings and eleven
46 pence parcel of the aforesaid seventy-nine shillings and
eleven pence. And whereas also the said Thomas Brooks
" afterwards, to wit, on the first day of July in the year
66 of our Lord one thousand seven hundred and three, at
66 Netherflocton aforesaid, borrowed of the said Sir William
66 Huftler, Sir Richard and William Ofbaldefton, forty shil- Mutuatus for
" lings, refidue of the aforefaid feventy-nine shillings and 40s.
"eleven pence, to be paid to the said Sir William Huftler,
" Sir Richard and William Ofbaldeston, when he should be
46 thereunto required: Nevertheless the said Thomas
" Brooke, although often requested, hath not yet paid the
4 aforesaid seventy-nine shillings and eleven pence, nor
44 any part thereof, to the same Sir William Huftler, Sir
46 Richard and William Ofbaldeston, or either of them, but
46 hath hitherto refused and still refuses to pay the same to
45 them or any of them; wherefore they say that they are
" injured and have damage to the value of one hundred
" shillings: And thereupon they bring suit, &c.
  " And the aforesaid Thomas Brooke, by Henry Wood his
attorney, comes and defends the force and injury when,
" &c., and fays nothing in bar or preclusion of the faid
46 action of the faid Sir William Huftler, Sir Richard and
William Osbaldeston: Whereupon the same Sir William
" Huftler, Sit Richard and William Ofbaldeston, remain
s against the said Thomas Brooke thereupon undefended:
Therefore it is confidered that the faid Sir William Huft- Judgment.
" ler, Sir Richard and William Ofbaldeston, do recover
" against the said Thomas Brooke their said debt, and their
66 damages by occasion of the detention of that debt to
" eight pounds, by the Court here adjudged to the same
" Sir William Hustler, Sir Richard and William Osbaldes-
" ton, by their affent; and the same Thomas Brooke, in
" mercy, &c.
  "Afterwards, that is to say, on Tuesday next after eight
66 days from the day of St. Hilary in the same term, be-
fore the lady the queen at Westminster comes the afore- Errors assigned.
" said Thomas Brooke by Thomas Harvey his attorney, and
66 faith, that in the record and proceedings aforefaid, and
" also in giving of the judgment aforefaid, there is mani-
E e 3 " fest [ 778 ]
                          E e 3
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fest error, in this, to wit, that the declaration asoresaid " in the record aferefaid mentioned, and upon which the " judgment aforefaid in form aforefaid is given, and the "matter in the same contained, are not sussicient in law 66 to have or maintain that judgment thereupon given in form aforefaid; and so the said judgment thereupon in " form aforesaid given is erroneous and void in law; and "therefore in that there is manifest error. There is er-46 ror also in this, that where it appears by the said record, " that the faid judgment in form aforefaid given, was 66 given for the faid Sir William Huftler, Knight, Sir Elekard Oftaldeflon, Knight, and William Oftaldeflan, against him the said Thomas Brocke; whereas by the 46 law of the land of this kingdom of England, judgment " in the plea aforesaid ought to have been given for the 66 said Thomas Brooke against them the said Sir William " Huftler, Sir Richard Ofbaldefton, and William Ofbaldefton; " and therefore in that there is manifest error: And he 66 prays, that the faid judgment for the errors aforefaid, 44 and others being in the record and proceedings afore-" faid, be revoked, annulled, and altogether deemed as onone; and that the same Thomas Brooke be restored to all 66 things, which by occasion of the judgment afcresaid he hath lost; and that the faid Sir William Huftler, Knight, " Sir Richard Ofbaldeften, Knight, and William Ofbalde-" flon, may rejoin to the errors aforesaid, &c. 66 faid Sir William Huftler, Knight, Sir Richard Ofbaldef-" ton, Knight, and William Ofbaldefton, by Adrian Moore 66 their attorney, come and forthwith fay, that there is not so any error either in the record and proceedings afore-66 faid, or in the giving the judgment aforefaid; and pray that the Court of the lady the queen now here may proceed to the examination as well of the record and proceedings aforefaid, as of the matters aforefaid by him "the faid Thomas Brooks above affigued for errors, and of that the judgment aforefaid be in all things affirmed."

Joinder in er-

Julgment afnicket. Pleas before the Lord the King and the Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of our Lord William and Lady Mary, now King and Queen of England, &c. Roll 166.

### Barker against Winch.

Berksbire, "SIMON Winch late of Bray in the county Salk. 56. Comb. to wit, "Salk. 56. Comb. aforesaid, Gent., was attached to answer Cases B. R. 13. Thomas Barker, Gentleman, of a plea, wherefore with S. C. Ejectment force and arms he entered into fix meffuages, fix cot- in B. R. by oritages, fixty acres of land, fixty acres of meadow, three ginal upon two feveral demifes. 66 hundred acres of pasture, and forty acres of wood, with 46 the appurtenances, in the parish of Bray, which William "Yieldall and Rebecca his wife demised to the said Thoso mas for a term which is not yet past; and into other 66 fix messuages, fix other cottages, fixty other acres of 46 land, fixty other acres of meadow, three hundred other se acres of pasture, and forty other acres of wood, with 66 the appurtenances, in the parish of Bray aforesaid, " which John Lidgold the younger also demised to the se faid Thomas Barker for a term which is not yet past, 46 and him from his farms aforesaid ejected, and other " enormities to him did, to the great damage of the faid "Thomas, and against the peace of our lord the king and " our lady the queen now, &c. And whereupon the " same Thomas Barker, by William Turbill his attorney, 66 complains, that whereas the faid William Yieldall and "Rebecca his wife, on the first day of April in the third 46 year of the reign of our lord and lady now king and queen of England, &c., at the parish of Bray, demised to the same Thomas the aforesaid six messuages, six cot-66 tages, fixty acres of land, fixty acres of meadow, three 46 hundred acres of pasture, and forty acres of wood, with "the appurtenances, to have and to occupy the same te-" nements with the appurtenances, to the same Thomas 66 Barker and his assigns, from the twenty-fifth day of " March then last past to the full end and term of five 46 years from thence next following, fully to be complete 46 and ended; by virtue of which faid demise the same "Thomas Barker entered into the faid tenements with the 46 appurtenances last abovesaid, and was possessed thereof; 46 And also that whereas the faid John Lidgold, on the Second demises

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# Pleadings to the Cales.

" fame first day of April, in the third year above said, at " the parish of Bray aforesaid, demised to the same The-

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" mas Barker the aforefuld fix other meffuages, fix other cottages, fixty other acres of land, fixty other acres of " meadow, three hundred other acres of pasture, and forty other acres of wood with the appurtenances, to have 44 and to occupy the same tenements with the appurte-" nances to the faid Thomas and his affigns, from the " aforesaid twenty-sisth day of Marchthen last past unto the 44 full end and term of five years from thence next follow-" ing, and fully to be complete and ended; by virtue of " which demise the said Thomas entered into the said tees nements with the appurtenances last above mentioned, " and was possessed thereof; and being so possessed thereof, and being also possessed of the said several tenements with the appurtenances as aforesaid, the said Simon " Winch afterwards, to wit, on the faid first day of April " in the third year abovefaid, with force and arms, &c. entered into the aforesaid tenements with the appurte-66 nances, which the faid William and Rebecca his wife had demised to the said Thomas Barker in form aforesaid, for 66 the said term first above specified which is not yet past, and into the aforesaid tenements with the appurtenances 46 which the faid John Lidgold had demised to the same 66 Thomas Barker in form aforesaid, for the said term last 46 above specified, which is not yet past, and him the said 66 Thomas Barker from his farms aforesaid ejected, and other enormities, &c., to the great damages, &c., and against the peace, &c. Wherefore he faith that he is " injured, and hath damage to the value of one hundred opounds: And thereupon he brings suit, &c. And the " aforesaid Simon Winch by John Sandwell his attorney comes and fays, that the tenements in the declaration aucient demesne. 66 aforesaid above specified are, and from the time of which the memory of man is not to the contrary, were of parcel of the manor of Bray in the county aforelaid, of which faid manor our lord the king and our lady the " queen are seised in right of their crown, and that the manor aforesaid is of the ancient demesne of the crown 66 of our lord the king and our lady the queen; and that the aforefaid tenements are pleadable, and have been of pleaded in the court of the manor aforefaid, by writ of right close of our lord the king and our lady the queen, 66 from the time of which the memory of man is not to " the contrary; and this he is ready to verify as the Court

> " shall consider, &c. Wherefore he prays judgment if 44 the Court of the lord the king and the lady the queen " here will take conusance of plea thereupon, &c.

Pleads in abatement that the lands are parcel of a manor in

And only impleadable in the court of the manor by writ of right close.

4 And the aforesaid Thomas Barker saith, that notwith- Demurier.

st standing any matters by the said Simon Winch above in 66 his plea alleged, the Court of our lord the king and lady "the queen here ought not to be precluded from having cognizance of the plea aforesaid; because he saith that " the plea aforesaid by him the said Simon in manner and form aforesaid above pleaded, and the matter in the same 66 contained, are not fufficient in the law to preclude the " faid Court of our lord the king and lady the queen now " here from having cognizance of the plea aforefaid, to "which faid plea and the matter in the fame contained 46 the faid Thomas Barker need not, neither by the law of "the land is he bound, in any manner to answer: And "this he is ready to verify: Wherefore for want of a suf-66 ficient answer in this behalf, the said Thomas prays 66 judgment and his term aforefaid yet to come of and in 46 the tenements aforesaid with the appurtenances, toge-66 ther with his damages by occasion of the trespass and 46 ejectment aforesaid, to be to him adjudged, &c. And Special cause of 66 for causes of demurrer in law upon that plea, he the s faid Thomas, according to the form of the statute in such " case thereupon lately made and provided, shews and de-"monstrates to the Court here these causes following, to " wit, For that the said Simon in his said plea hath not " shewn to the Court here, nor hath alleged, that the te-66 nements aforefaid, with the appurtenances in the faid " declaration mentioned, nor any parcel thereof, are held of the lord and lady the now king and queen of their 66 manor of Bray aforesaid; and because the plea afore-66 faid is insensible, uncertain, and wants form.

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" wherefoever,

66 And the aforesaid Simon saith, that the plea aforesaid Joinder. " by him the faid Simon in manner and form aforefaid " above pleaded, and the matter in the fame contained, 44 are good and fusficient in the law, to preclude the " faid Court of the faid lord the king and lady the queen of now here from having cognizance of the plea aforefaid, 66 which faid plea and the matter in the same contained 66 he the faid Simon is ready to verify and prove as the " Court, &c. And because the said Thomas hath not " answered to that plea, nor hath hitherto in any manner " contradicted it, he the faid Simon as before prays judg-"ment, if the Court of the faid lord the king and lady " the queen now here will or ought to take cognizance " of the plea aforesaid: But because the Court of the Continuance. " faid lord the king and lady the queen now here are not " yet advised of giving their judgment of and concern-" ing the premises, day is thereupon given to the faid " parties before the lord the king and lady the queen, " until three weeks from the day of the Holy Trinity,

" wheresoever, &c. of hearing their judgment therein,

of for that the Court of our faid lord the king and lady "the queen now here thereof is not yet, &c. At which " day before our lord the king and lady the queen at " Westminster come the parties aforesaid by their attor-" nies aforesaid: But because the Court of our said lord " the king and lady the queen now here are not yet ad-" vised of giving their judgment of and upon the pre-" mises, day is therefore given to the parties aforesaid be-" fore the lord the king and lady the queen, until on the 46 morrow of Souls, wherefoever, &c. of hearing their so judgment thereupon, for that the Court of the faid 66 lord the king and lady the queen now here is not yet " thereof, &c. At which day before the lord the king 46 and lady the queen at Westminster came the said parties 66 by their faid attornies: Whereupon all and fingular the or premises being seen, and by the Court of the said lord " the king and lady the queen now here more fully un-"derstood, and mature deliberation being thereon had, " for as much as it appears to the Court of our faid lord 66 the king and lady the queen now here, that the faid 66 plea by the faid Simon in manner and form aforesaid so above pleaded, and the matter in the fame contained, 46 are not fufficient in law to preclude the faid Court of " our faid lord the king and lady the queen now here " from having conusance of the plea aforesaid; it is said " by the Court to the faid Simon that he further answer "to the declaration aforefaid; and upon this the faid " Simon being folemnly required, by the faid John Sand-" well his attorney, comes and defends the force and in-" jury when, &c. and faith that he the faid Simon is in " nowise guilty of the trespais and ejectment aforesaid, " as the faid Thomas above against him complains: And " of this he puts himself upon the country; and the said "Thomas in like manner, &c. Therefore the sheriff is " commanded that he cause to come before our lord nire on a trial at 66 the king and lady the queen, in eight days of the Pu-" rification of the bleffed Mary, wherefoever, desect of justers. " twelve, &c. by whom, &c. and who neither, &c. to " recognize, &c. because as well, &c. The fame 46 day is given to the parties aforesaid, here, &c. "On which day the jury aforefaid between the parties 44 aforefaid of the plea aforefaid is thereupon respited 46 between them, before the lord the king and the lady the queen, until one month from the day of Easter from "thence next enfuing, wherefoever, &c. for defect of

" jurors, &'r. At which day before our lord the king " and lady the queen at Westminster came the said parties by their faid attornics, and the jurors of that jury being

" likewife

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Judgment that he answer over.

Not guilty.

Awarding a reiar, and continumbe over for

46 likewise summoned came, who were elected, tried, and " fworn to speak the truth concerning the premises; and as to the trespass and ejectment aforesaid of and in the faid fix meffuages, fix cottages, fixty acres of " land, fixty acres of meadow, three hundred acres of " pasture, and forty acres of wood, with the appurte-" nances, in the declaration aforefaid by the faid William "Yieldall and Rebecca his wife to the faid Thomas Barker "demiled as aforesaid, upon their oath say, as to one " fourth part of thirty-two acres of land thereof, with " the appurtenances, held of the manor of Lords Lands, 46 and being in the tenure of one William Whitehand, that the faid Simon Winch is guilty of the trespass and eject-"ment aforefaid, as the faid Thomas above against him ecomplains; and as to the refidue of the faid fix mef- As to part for fuages, fix cottages, fixty acres of land, fixty acres the plaintiff, and not guilty as to of meadow, three hundred acres of pasture, and other part. forty acres of wood, with the appurtenances, by the 44 said William Yieldall and Rebecca to the said Thoes mas demised as aforesaid, the same jurors upon their 66 oath aforesaid say, that the said Simen is not guilty of "the trespass and ejectment aforesaid, as the said Simon 46 hath above in his plea alleged; and as to the trespass And as to the " and ejectment aforesaid, of and in the said six other second demise, meffuages, fix other cottages, fixty other acres of land, find as part for the plaintiff, and fixty other acres of meadow, three hundred other acres part for the deof pasture, and forty other acres of wood with the ap-fendant. 66 purtenances, in the declaration aforesaid, by the said " John Lidgold the younger, to the said Thomas Barker demised as aforesaid, the same jurors say upon their 66 oath aforefaid, as to one fourth part of thirty-two 46 acres of land held of the manor of Lords Lands, and 66 being in the tenure of the faid William Whitehand, that " the said Simon Winch is guilty of the trespass and ejectment aforefaid, as the faid Thomas above complains " against him, and affess the damages of him the said "Thomas by occasion of the premises aforesaid, besides " his costs and charges by him concerning his suit in this " behalf applied, to twenty shillings, and for those costs 46 and charges to thirty shillings: And as to the residue " of the faid fix other messuages, fix other cottages, fixty 66 other acres of land, fixty other acres of meadow, three "hundred other acres of pasture, and forty other acres of " wood, with the appurtenances, in the declaration afores faid, by the faid John Lidgold demised as aforefaid, the " fame jurors upon their faid oath further fay, that the " faid Simon Winch is not guilty of the trespass and eject-" ment aforesaid, as the said Simon above in his plea hath alleged: Therefore it is considered that the said Thomas Judgment as to what the defended

Verdict as to the

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" Barker

ant in fored galass. " Barter do recever against the said Simon Winch his said " term yet to come of and in the faid fourth part of the " faid shirty-two acres of land with the appurtenances " held of the manor of Lords Lands, and being in the es tenure of the said William Witteband, parcel of the " faid fix meffuages, fix cottages, fixty acres of land, " fixty acres of meadow, three hundred acres of pasture, " and forty acres of wood, with the appurtenances, by " the faid William Yieldall and Reserve his wife to the " faid Thomas Barker demised as aforefaid, whereof it is " above found by the faid jury, that the faid Simon is " guilty of the trespals and ejectment aforesaid, and his " faid other term yet to come of and in the faid other " fourth part of the faid thirty-two acres of land " with the appurtenances, held of the manor of Lords " Lands aforesaid, in the tenure of the said William "Whitehand, parcel of the aforefaid fix other meffuages, " fix other cottages, fixty other acres of meadow, three " hundred other acres of pasture, and forty other acres " of wood, with the appurtenances, by the faid Jubat " Lidgold the younger to the faid Thomas Barker demised " as aforesaid; whereof it is likewise above found by the " jury aforesaid, that the said Simon is guilty of the tres-" pals and ejectment aforefaid, and his said damages by " the faid jury in form aforefaid affeffed; and also ninety-" nine pounds for his costs and charges aforefaid adjudged " by the Court of the faid lord the king and lady the " queen now here to the faid Thomas Barker, by his 44 affent, of increase; which said damages in the whole " amount to one hundred and one pounds; and that the " said Simon Winch be taken, &c., and likewise that the " said Themas Barker be in mercy for his false complaint " against the said Simon Winch, for the residue of the " trespals and ejectment asoresaid; whereof the said Simon " by the jury aforesaid in form aforesaid is acquitted, and that the faid Simon go thereupon without day," &c.

Capiation.

Acquired, and without day as to the soil. Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of our Lord James the Second, now King of England, &c. Roll 1019.

Countess of Plymouth against Throgmorton and his Wife.

HE lord the king hath given in charge to his Writ of error, trusty and well-beloved Sir Edunard Harbort Knt. 2 Mod. 162. trusty and well-beloved Sir Edward Herbert, Knt., 3 Mod. 153. 44 his Chief Justice of the Common Bench, his writ closed in these words, to wit, James the Second, by the Grace of GOD, of England, Scotland, France, and Ireland "King, Defender of the Faith, &c. To his trusty and " well-beloved Sir Edward Herbert, Knt., his Chief "Justice of the Common Bench, greeting: Forasmuch " as in the record and proceedings, and also in the giving "the judgment of the plaint which was in our Court " before you and your brethren our justices of the Com-" mon Bench, by our writ, between Thomas Throckmorton, Esq. and Dorothy his wife, executrix of the will of Sir " Edward Pick, Knt. and Bridget counters dowager of " Plymouth, executrix of the will of Charles earl of Ply-" mouth, to the end that the same Bridget countess dowa-" ger of Plymouth, should render to the said Thomas and "Dorothy seventy-five pounds, as it is said, manifest error 46 hath intervened to the great damage of her the faid " Bridget countess dowager of Plymouth, as we are informed by her complaint; We willing that the error, " if any hath been, be in due manner amended, and that 66 full and speedy justice be done to the said parties in "this behalf, do command you, that if judgment be 46 thereupon given, then you fend to us under your feal "distinctly and plainly the record and proceedings afore-" faid, with all things touching the same, and this writ; " fo that we may have them from the day of the Holy "Trinity in three weeks, wherefoever we shall then be in 66 England, that inspecting the record and proceedings " aforesaid, we may cause to be done farther thereupon, " for amending that error, that which of right and ac-" cording to the law and custom of our kingdom of " England shall be meet to be done. Witness ourself at " Westminster the eighth day of June in the third year of " our reign. Santhey.



" The answer of Sir Edward Herbert, Knt. Chief Jul-" tice within named. The record and proceedings of the " plaint within mentioned, with all things touching the " ime, before the lord the king, wherefoever, &c. at " the day within contained, I fend in a certain record to " this writ annexed, as I am within commanded.

Edw. Herbert.

" ward

" Pleas at Westminster, before Six Edward Herbert, 46 Knt. and his fellow justices of the lord the king of the " Common Bench, of the term of Easter in the third " year of the reign of our lord James the Second, by the " Grace of GOD, of England, Seetland, France, and Ire-" land King, Defender of the Faith, &c. Rall 616.

" Middlesex, to wit, Bridge: countels dowager of Pises mouth, executrix of the last will and teltament of

66 Charles earl of Pigmouth, was summoned to answer

Pe leertion upon a warrant of at-

44 Thomas Trockmorton, Efq. and Dorothy his wife, execu-46 trix of the last will and testament of Sir Edward Pick, "Knt. of a plea that the render to them feventy-five " pounds, which from them she unjustly detains, &c. 46 And whereupon the same Thomas and Dorothy, by 66 Charles Draper their attorney, fay, that whereas the to me to the tafe se faid earl in his lifetime, to wit, on the third day of tith by in ext. " Mar in the thirty-fecond year of the reign of our lord " Charles the Second, late king of England, &c. at Ifling-" ten, by his certain deed, which the same Themas and " Derecks produce here in court, dated the same day and " year, did give an authority to the same Sir Edward 66 to require and receive all and all manner of fum and " fums of money which then were, or at any time or " times to come within three years then next following " thould become due and payable to the same earl upon " any account whatfoever, and to pay and dispose thereof as he the faid earl from time to time should order and appoint the same Edward by any writing or writings under his hand during the faid three years, and " for the care and labour of the faid Sir Edward in the " pramifes aforciaid, the faid earl bound himself by Shapefrook " the fame writing to pay to the faid Sir Edward one Pr ann. 31.0 wed to hundred pounds by the year of lawful money of Eng-44 land during the aforefaid three years, or otherwise that out of what he es it should be lawful for the said Sir Edward Pick to er retain and pay to himfelf the faid one hundred pounds by the year during the aforefaid three years, out of fuch monies as he should receive by virtue of the said deed, - as by the fame deed more fully appears; and the faid 46 Thema, and Dorothy in fact fay, that he the faid Ed-

to be deducted Ter. ves.

eutair and her

Lutis:

ward afterwards, and for the space of three quarters of a year from thence next following, at Islington aforefaid, from time to time did folicit and require divers demands several persons then debtors to the said earl to pay many sums sums of money, of money then from them due and payable to the faid but none paid. earl: But during the faid three quarters of a year, or ee at any time afterwards, the faid Sir Edward did not T 786 ] receive any fums of money by virtue of the fame deed, " wherewith he could pay himself the said one hundred 66 pounds, or any part thereof; whereby an action ac- Whereby the crued to the same Sir Edward in his lifetime, to require action accrued. and have of the faid earl the faid feventy-five pounds: Wevertheless the said earl in his lifetime, and the said Breach. countess after his the said earl's death, although often " requested, or either of them, have or hath not yet paid the seventy-five pounds to the said Sir Edward in his 66 lifetime, or to the faid Dorothy after the death of the se said Sir Edward while she was sole, or to the said " Thomas and Dorothy after the marriage between them " celebrated, or to any of them, but refused to pay the " fame to the faid Sir Edward in his lifetime, and to the " same Thomas and Dorothy after the marriage between them celebrated; and she the same counters doth still se refuse to render the same to the said Thomas and Docorothy, and unjustly detains the same in delay of the " faithful execution of the will of the faid Sir Edward, and to the damage of them the faid Thomas and Dorothy " of ten pounds: And thereupon they bring fuit, &c. Profert of the 46 And the same Thomas and Dorothy produce here in letters testacourt the letters testamentary of the aforesaid Edward, duced. " by which it fusficiently appears to the Court here, that " she the said Dorothy is executrix of the will of the said " Edward, and thereof hath administration, &c. "And the faid Bridget, by William Rymer her attorney, " comes and defends the force and injury, when, &c. 46 and fays nothing in bar or preclusion of the action of 66 the faid Thomas and Dorothy aforefaid, whereby the " same Thomas and Dorothy thereupon remain against the aforefaid Bridget undefended: Therefore it is consi- Judgment by 66. dered, That the faid Thomas and Dorothy recover against 46 the faid Bridget their faid debt, and their damages by occasion of the detention of that debt, to fifty shillings, 10 the same Thomas and Darothy, by their assent, by the "Court here adjudged, to be levied of the goods and " chattels which were the faid earl's at the time of his es death, being in the hands of the same Bridget to be administered, if she hath so much in her hands to administer; and if the hath not, that then the damages " aforefaid

" aforefald be levied of the proper goods and chattels of " the faid Bridget; and the faid Bridget countels of Ply-" nouth, in mercy, Ec.

Limit affigned

" And the aforeiaid Bridget countels dowager of Ply-" mouth, by Henry Doughty her attorney, cometh and " faith, that in the record and proceedings aforefaid, and es also in giving of the judgment asoresaid, there is ma-" nifest error, in this, to wit. That the declaration afore-" faid, and the matter in the fame contained, are not " sufficient in the law to have and maintain the action " aforefaid of the faid Thomas and Dorothythereupon against " her the said countes: Therefore in that there is mani-" fest error. There is error also in this, that by the record " aforefaid it appears, that the faid judgment in manner

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" and form aforefaid given was given for the faid Thomas " and Dorothy against her the said countess, in the plea of aforefaid, whereas by the law of the land of this king-46 dom of England, that judgment ought to have been " given for the same countess against the said Thomas and "Derethy; and therefore in this there is likewise mani-

No warrant of attorney, and

" fest error: And the said countess further saith, that "there is error in this also, to wit, that there is not any certificate prayed. 66 wafrant of attorney filed of record in the faid Court " of Common Bench between the faid parties of the plea " aforesaid, to warrant Churles Draper to be attorney for " the faid Thomas and Dorothy against the faid countess " in the plea aforefaid; therefore in that likewife there " is manifest error; wherefore the same counters prays a writ of the lord the king of certiorari to be directed " to the Chief Justice of the faid lord the king of the " Common Bench, &c. And it is granted to her, &c.

Entry of the Contionari.

" by which it is commanded that Sir Edward Herbert, "Kut., Chief Justice of the Common Bench aforefaid, " examine the rolls and other remembrances of the war-" rants of attorney of the county of Middlefex, of the " term of Easter in the third year of the reign of the faid " lord the king, being in his cultody of record, and with-" out delay to certify what in the fame he shall find there-" upon to the faid lord the king, wherefoever, &c. to-" gether with the writ of the faid lord the king, to him " for that purpose directed, &c. Which said Chief " Justice of the Bench aforefaid of our faid lord the king

Return of the Chier Just en-

> " answered, that the execution of the writ aforesaid ap-" peared in a schedule to the same writ annexed, in which 6 schedule are contained the title of the rolls of the war-" rants of attorney filed of the faid term of Easter in the · aforefaid writ specified, being in the custody of him " the faid Chief Justice of record; and the record of a " certain warrant of attorney between the parties afore-

" faid

faid of the plea aforefaid in the same form in which the 66 same warrant of attorney is entered of record in the 44 fame rolls, which faid title and warrants of attorney 66 follow in these words. Rolls of attornies received be-" fore Sir Edward Herbert, Knt., Chief Justice of the lord 46 the king of the Common Bench, and his brethren, of the se term of Easter in the third year of the reign of our " lord James the Second, by the Grace of GOD, of England, Scotland, France, and Ireland King, Dese fender of the Faith, &c. " Middlefex, to wit, Thomas Throckmorton, Efq. and Warrant of at-

66 Dorothy his wife, executrix of the last will and testa- tomey. ment of Sir Edward Pick, Knt. puts in his stead Charles " Draper his attorney, against Bridget countess dowager of Plymouth, executrix of the last will and testament of " Charles earl of Plymouth, of a plea of debt, which faid " writ is filed amongst the records without day, &c. "And hereupon the aforesaid Thomas and Dorothy, by " Michael Johnson their attorney, come gratis here in court, and the aforesaid Bridget countess dowager of " Plymouth as aforefaid, faith, that in the record and " proceedings, and also in the giving of judgment aforefaid, there is manifest error, alleging the errors afore-66 faid by him in form aforefaid alleged, and prays that " the faid judgment for the errors aforesaid, and others 66 being in the record and proceedings aforesaid, may be " reversed, annulled, and entirely deemed as none; and " that she be restored to all which by occasion of the "judgment aforesaid she hath lost, &c. And that the " said Thomas and Dorothy to the errors aforesaid may " rejoin, &c. And that the Court of the faid lord the "king here may proceed to the examination as well of 66 the record and proceedings aforefaid as the matters " aforesaid above assigned for errors, &c. And the said "Thomas and Dorothy say, that there is not any error "either in the record and proceedings aforefaid, or in "the giving of the judgment aforefaid; and in like man- Defendants re-" ner pray that the Court of the faid lord the king may join in error. " proceed to the examination as well of the record and for proceedings aforefaid, as of the matters aforefaid above " assigned for errors, and that the judgment aforesaid 66 be in all things affirmed, &c. And because the Court Continuances. of the faid lord the king now here are not yet advised 66 of giving their judgment herein; day is therefore given 66 to the parties aforefaid before the faid lord the king, until three weeks from the day of St. Michael then next following, wherefoever, &c. of hearing their judgment "thereon, forasmuch as the Court of the lord the king " now here are not yet thereupon, &c. At which day

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" before

" before the king at Westminster come the parties asore-" faid by their faid attornies: But because the Court of 46 the faid lord the king now here are not yet advised of " giving their judgment of and upon the faid premises, " day is therefore given to the parties aforefaid before 44 the lord the king, until eight days from the day of St. 44 Hilary, wherefoever, &c. of hearing their judgment " thereon, forasmuch as the Court of the said lord the 46 king here thereon are not yet, &c. At which day be-66 fore the lord the king at Westminster come the parties 46 aforefaid by their faid attornies: But because the Court ee of the faid lord the king now here are not yet advised " of giving their judgment of and upon the premifes, day is therefore given to the parties aforesaid before the " lord the king, until fifteen days from the day of Eafter, " wherefoever, &c. of hearing their judgment thereon. in regard that the Court of the faid lord the king here " therein are not yet, &c. At which day before the " lord the king at Westminster come the said parties by their attornies aforesaid: Upon which as well the record and proceedings aforefaid, and the judgment given 46 thereon, as the faid causes and matters above affigued " for errors, being feen and more fully understood and 44 diligently examined by the Court of our faid lord the " king here; foralmuch as it feems to the Court of our 44 faid lord the king now here, that in the record and er proceedings aforefaid, and also in the giving of the " judgment aforesaid, there is manifest error, it is con-" fidered that the faid judgment for the errors aforefaid, and others in the record and proceedings aforefaid, be " revoked, annulled, and altogether deemed as none; 46 and that the aforesaid Bridget countess dowager of " Plymouth, be restored to all things which by occasion of " the judgment aforesaid she hath lost," &c.

Judgment re-

Pleas before the Lord the King at Westminster, of the Term of Easter in the Eighth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 201.

Freeman and others against Bernard and others.

[3 Ld. Raym. Entries 368. S. C.]

London, "BE it remembered, That heretofore, to wit, Comb. 440. to wit, "BE in the term of St. Hilary in the fixth year Carth, 378. of the reign of the lord William the Third, now King Salk. 69. Cafes of England, &c., before the same lord the king at Walk. of England, &c., before the same lord the king at West-3 Salk. 45. minster came Thomas Freeman and Thomas Haggar by Holt 79. S. C. " Benjamin Mould their attorney, and brought into the " court of our faid lord the king then there their certain " bill against Samuel Bernard and Thomas Rodbard in cus-" tody of the marshal,  $\mathcal{C}_c$  of a plea of trespass upon the " case, &c.; and there are pledges of prosecuting, name-" ly, John Doe and Richard Roe; which faid bill followeth in these words; that is to say, London, to wit, Tho-66 mas Freeman and Thomas Haggar complain of Samuel Bernard and Thomas Rodbard in the custody of the mar-66 shal of the Marsbalsea of the lord the king, before the 46 king himself being, for that, to wit, that whereas on the Declaration upeighth day of August in the year of our Lord one thou- on an agreement fand fix hundred and ninety-three, at London aforesaid, to deliver fixteen bigs of hops beto wit, in the parish of St. Mary le Bow in the ward of fore December " Cheap, it was agreed between them the faid Thomas 25. " Freeman and Thomas Haggar and the faid Samuel Ber-" nard and Thomas Rodbard in manner and form following; that is to fay, that the faid Samuel Bernard and "Thomas Redbard should deliver to the faid Thomas Free-" man and Thomas Huggar fixteen bags of good new hops 6: of the then next growth, good brewers ware, at thirty 46 and four shillings by the hundred weight, and that they 66 should be delivered at or before the twenty-sifth day of 66 December then next following, and thereupon in consis- Mutual promises 46 deration that the faid Thomas Freeman and Thomas agreement. " Haggar had paid to the said Samuel Bernard and Thomas Rodbard one piece of gold coin, called a guinea, of law-" ful money of England, in part of payment thereof, and st then and there, at the special instance and request of them the same Samuel Bernard and Thomas Rodbard, " had took upon themselves and had faithfully promised the faid Samuel and Thomas Rodbard to perform the " agreement aforefaid in all things on the part of them the

" faid Thomas Freeman and Thomas Haggar to be per" formed or fulfilled, according to the form and effect of

hops.

Escach in not delivering the

Eccond count
up on another
agreement in
writing fet forth,
to deliver other
fixteen bags of
hops, and left in
the hands of a
third person.

Collequium touching the sgreement.

"the aforefaid agreement, they the faid Samuel Bernard " and Thomas Rodbard took upon themselves, and then and 66 there faithfully promifed the faid Thomas Freeman and " Thomas Haggar, that they the same Samuel and Thomas " Rodbard would well and truly perform and fulfil the " agreement aforefaid in all things on the part of them the " faid Samuel and Thomas Rodbard to be performed or fulfilled: Nevertheless the said Samuel and Thomas Rod-" bard their promise and undertaking aforesaid not at all " regarding, but contriving and fraudulently intending " the same Thomas Freeman and Thomas Haggar in this part craftily and fubtilly to deceive and defraud, have " not delivered to the faid Thomas Freemar and Thomas "Huggar, or either of them, the faid fixteen bags of hops, or any parcel thereof, upon or before the faid twenty-46 fifth day of December next following after the making "the faid agreement, or at any time afterwards, but have hitherto altogether refused and still do refuse to deliver " the fame to them. And whereas also afterwards, to " wit, on the faid eighth day of August in the year of our " Lord aforefaid, at London aforcfaid, in the parish and ward aforefaid, a certain other agreement was had and " made in writing between the faid Samuel and Thomas Reabard and them the faid Thomas Freeman and Thomas " Haggar in form following, that is to fay, that the faid " Samuel Bernard and Thomas Rodbard should deliver to 44 them the fame Thomas Freeman and Thomas Haggar 66 fixteen other bags of good new hops of the then next growth, good brewers ware, at the rate of thirty-four " flillings by the hundred; and that they should be deli-" vered upon or before the twenty-fifth day of December " then next following, which faid written agreement was " left in the hands of one Thomas Ruck: And whereas af-" terwards, to wit, on the fame eighth day of August in " the year abovefaid, at London aforefaid, in the parith and ward aforefaid, a certain difcourfe was had and moved " between the faid Samuel and Thomas Rodbard and the " faid Thomas Freeman and Thomas Haggar, of and con-66 cerning the faid agreement last mentioned, and of and " concerning the delivery of two loads of hops to the fame " Thomas Freeman and Thomas Haggar, by the faid Samuel " and Thomas Rodbard to be made, and upon that difcourse between the said Samuel and Thomas Rodbard and the same Thomas Freeman and Thomas Haggar, two other loads of hops, according to the faid agreement, fo as aforefaid left in the hands of the faid Thomas Ruck, and 66 that they the fame Thomas Freeman and Thomas Haggar " fhould fhould accept the faid hops last mentioned, according to

the faid first agreement last recited; and thereupon, in " consideration that they the same Thomas Freeman and "Thomas Haggar then and there, at the special instance and request of the faid Samuel and Thomas Rodbard had paid to the faid Samuel and Thomas Rodbard one other piece of gold coin, called a guinea, of lawful money of " England, in part of payment for the same hops last men-"tioned, and had took upon themselves, and faithfully or promised the same Samuel and Thomas Rodbard to per-" form and fulfil the agreement aforefaid in all things on " the part of them the faid Thomas Freeman and Thomas 46 Haggar to be performed and fulfilled, according to the 46 form and effect of the agreement aforesaid last men-"tioned, they the same Samuel and Thomas Rodbard took " upon themselves, and then and there faithfully promised " the same Thomas Freeman and Thomas Huggar, that they " the same Samuel and Thomas Rodbard would well and " faithfully perform and fulfil the faid agreement last "mentioned in all things on the part of them the faid Sa-" muel and Thomas Rodbard to be performed and fulfilled: " Nevertheless the aforesaid Samuel and Thomas Rodbard Breach. "their faid promifes and undertakings last mentioned in " form aforesaid made not regarding, but contriving and " fraudulently intending the fame Thomas Freeman and 66 Thomas Haggar in this behalf craftily and cunningly to 46 deceive and defraud, have not, nor hath either of them " delivered the faid two loads of hops last mentioned, or 44 any parcel thereof, to the same Thomas Freeman and 66 Thomas Haggar, upon or before the faid twenty-fifth " day of December next following after the making the " faid promife and undertaking last mentioned, or at any "time afterwards, but have hitherto altogether refused, " and yet do refuse, to deliver the same to them; where-" fore the faid Thomas Freeman and Thomas Haggar fay, "that they are injured and have damage to the value of " two hundred pounds: And thereupon they bring fuit, « &c. " And now at this day, to wit, Wednefday next after fif-" teen days from the day of Easter, until which day the " faid Samuel and Thomas Rodbard had leave to imparle to "the faid bill, and then to answer, &c. before the lord "the king at Westminster, come as well the said Thomas " Freeman and Thomas Haggar by their faid attorney, as "the faid Samuel and Thomas Rodbard by John Bernard their attorney: And the samuel and Thomas Rod-

" bard defend the force and injury when, &c., and fay " that the faid Thomas Freeman and Thomas Haggar ought " not to have or maintain their action aforesaid thereupon Ff 3

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" against them; because they say, that after the making

" the several promises and undertakings above in the said

A fubmission to arbitration pleaded.

" declaration specified, that is to say, on the second day of November in the year of our Lord one thousand fix " hundred and ninety-four, at London aforesaid, to wit, at " the parish of St. Mary le Bow in the ward of Cheap " aforesaid, as well the said Thomas Freeman and Thomas " Haggar as the faid Samuel and Thomas Rodbard did sub-" mit and put themselves to the award, ordination, and " judgment of Sir John Parsons, Knight, and Richard "Hammond, brewers arbitrators, as well on the part of the " faid Thomas Freeman and Thomas Haggar, as on the part " of them the faid Samuel and Thomas Rodbard, indifferently nominated and elected to award, ordain, adjudge, " and determine of, and upon, and concerning all and all " manner of action and actions, cause and causes of ac-"tions, fuits, debts, bonds, bills, specialties, executions, " accounts, fum and fums of money, differences, contro-" versies, trespasses, damages, claims, and demands what-" foever at any time before then had, moved, commenced, " profecuted, done, promifed, committed, or depending " in fuit, controversy, question, or demand, by or between " the faid Thomas Freeman and Thomas Haggar and the " faid Samuel and Thomas Rodbard, for or by reason of any " matter, cause, or thing whatsoever; so that the said ar-" bitrators should make and give their award and deter-" mination of and concerning the premises in writing in-" dented under their hands and feals, ready to be delivered " to the faid Thomas Freeman and Thomas Haggar, Samuel " and Themas Rodbard, or either or any of them, at or in " the mansion-house of Toby Winne scrivener, in a street " called Bartholomew Lane, near the Royal Exchange, Lon-" don, to wit, in the parish of St. Bartbolomew Exchange, " in the ward of Broadstreet, London, the faid Sir John " Parsons and Richard Hammond the arbitrators afore-" faid, having taken upon themselves the trouble of the " faid award, by a certain writing indented under the " hands and feals of the faid arbitrators, and ready to be delivered to the faid Thomas Freeman and Thomas Hag-

" gar, Samuel and Thomas Rodbard, either or any of them, did arbitrate, make, and give their award and determination of and concerning the premises, that the said Somuel and Thomas Rodbard, and also the said Thomas Freeman and Thomas Haggar, or the several respective executors and administrators of the said Samuel and Thomas Rodbard, Thomas Freeman, and Thomas Haggar, should mutually sign and seal, and as their act and deed deliver to and for the use of each other, their executors and administrators respectively, sull and sufficient generations."

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To be made in writing before the first of December.

Arbitrators make their award.

" ral releases and discharges of all actions, suits, accounts. debts, and demands whatfoever, in law or equity, of or concerning the premises, to the said arbitrators as afore-" faid in any manner submitted. And the said Samuel " and Thomas Rodbard say, that they, from the time of " making the faid award, always were and now are ready " to fign and feal, and as their acts and deeds deliver to "the fame Thomas Freeman and Thomas Haggar fuch re-« leafes and discharges, as by the said arbitrators are above " awarded, if the faid Thomas Freeman and Thomas Hag-" gar should and would be willing to accept those releases 46 and discharges from the said Samuel and Thomas Rod-" bard: And this they are ready to verify: Wherefore the " fame Samuel and Thomas Rodbard pray judgment, if the " faid Thomas Freeman and Thomas Haggar ought to have er or maintain their action aforesaid thereupon against ≪ them, &c. "To this the plaintiffs demurred, and the defendants

Pleas before our Lord the King and our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Seventh Year of the Reign of William the Third, now King of England, &c. Roll 176.

" joined in demurrer."

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# Bacon against Debary.

#### [3 Ld. Raym. Entries 361. S. C.]

London, "BE it remembered, That heretofore, that is Salk. 70. Skin. to wit, "BE it remembered, That heretofore, that is Salk. 70. Skin. to wit, "Be to say, in the term of Easter last past, be-679. Comb. "Gore the lord the king at Westminster came Josiah Bacon 439. Carth. 412. Cases by William Baker his attorney, and brought into the B. R. 129. "Court of the said lord the king then there his certain bill Holt78. S. C. against David Debary, otherwise called David Debary of London, merchant, in custody of the marshal, &c., of a plea of debt; and there are pledges of prosecuting, namely John Doe and Richard Roe; which said bill solwid loweth in these words, that is to say, London, to wit, Declaration upJosiah Bacon complains of David Debary, otherwise on a bond or arbitration.

Josiah Bacon complains of David Debary, otherwise on a bond or arbitration.

Called David Debary of London, merchant, in the custody of the marshal of the Marshalsea of our lord the king, before the king himself being, of a plea that he render

" to him fix hundred pounds of lawful money of England, " which he owes to him and unjustly detains, for that, to " wit, That whereas the faid David, on the eighth day of " November in the year of our Lord one thousand fix hun-" dred and ninety-four, at London, to wit, in the parish of " St. Mary le Bow in the ward of Cheap, by his certain writing obligatory, sealed with the seal of the same Da-" vid, which to the Court of the faid lord the king is now 46 here shewn, the date of which is the same day and year, " acknowledged himself to be held and firmly bound to " the faid Josiah in the aforesaid six hundred pounds, to " be paid to the same Josiah when he should be thereunto " requested: Nevertheless the said David, although often " requested, &c., hath not yet paid the said six hundred pounds to the said Josiah, but hath hitherto altogether " refused and still doth refuse to pay the same to him, to "the damage of the same Josiah of one hundred pounds: " And therefore he brings suit, &c.

" king at Westminster, comes as well the said Josiah by his " faid attorney, as the faid David by John Green his at-" torney, and the same David defends the force and in-" jury, when, &c., and prays oper of the writing obliga-

" tory; and it is read to him, &c.; he also prays over of " the condition of the same writing obligatory; and it is " read to him in these words, to wit, The condition of " this obligation is such, that if the above-bounden David " Debary, for and on the behalf of Jacob Dernyter of Ham-

"And now at this day, to wit, Friday next after the " morrow of the Holy Trinity in this same term, until " which day the faid David had leave to imparle to the " faid bill, and then to answer, &c. before the lord the

" borough, merchant, his executors and administrators, do " and thall well and duly fland to, obey, abide, observe, er perform, fulfil, and keep the award, arbitrement, order,

" final end, determination, and judgment of Maurice Wil-" liams, Nicholas Cutler, and Michael Milford of Landon, " merchants, or any two of them, arbitrators, as well on

44 the part and behalf of the above-named Josiah Bacon, 46 and by their mutual affents and confents indifferently

" elected, named, and chosen to arbitrate, award, order, "judge, determine, and a final end to make of, for, upon,

" and concerning all and all manner of action and actions, " cause and causes of action, suits, debts, accounts, reck-

onings, fum and fums of money, covenants, contracts, of promifes, trespasses, damages, bonds, bills, specialties,

" judgments, extents, executions, trespasses, strifes, dif-

" ferences, controversies, matters, claims, and demands

" whatfoever, as now are, or at any time before the date " above written have been moved, stirred up, or depend-

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ing between the faid David Debary, as attorney to the " faid Jacob Dernyter of the one part, and the faid Josiah "Bacon of the other part, for, touching, or concerning certain accounts between the faid Josiah Bacon and the " faid Jacob Dernyter, so as the faid award, arbitrement, " order, final end, determination, and judgment of the faid arbitrators, or any two of them, of and upon the pree mises, be made and set down in writing indented under "their hands and feals, and be delivered, or ready to be " delivered up unto the faid parties respectively in differ-" ence, requiring the same at or in the now dwelling-" house of John Chambers, scrivener, situate in Lombard-" fireet, London, on or before the one and twentieth day of "this instant November; then this obligation to be void, " or else to stand in full force and virtue; which being " read and heard, the same David Debary saith, that the " said Joseph Bacon ought not to have or maintain his said action against him thereupon; because he saith, that No award 44 the faid Maurice Williams, Nicholas Cutler, and Michael Pleaded. " Milford in the condition aforesaid named, or two of " them, did not make any award in writing indented un-" der their hands and feals, of, for, or concerning the pre-" mifes aforefaid in the condition aforefaid above specified, " upon or before the twenty-first day of November in the condition aforefaid mentioned, according to the form " and effect of the faid condition: And this he is ready to " verify: Wherefore he prays judgment if the said Josiah " Bacon ought to have or maintain his action aforesaid " thereupon against him, &c.

" And the faid Josiah Bacon faith, That he, notwith- Replies an of standing any thing by the said David Debary above in award. 46 his plea alleged, ought not to be precluded from having " his action aforesaid thereupon against him the said 66 David, because he saith, that after the making the 66 writing obligatory aforefaid, to wit, upon the twentyif first day of November in the year of our lord one thou-" fand fix hundred and ninety-four, in the faid conse dition specified, at London aforesaid, in the parish and ward aforesaid, the said Nicholas Cutler and Michael " Milford, two of the arbitrators in the faid condition 46 above specified, took upon themselves the trouble of " awarding and ordaining of and concerning the premifes in the faid condition above-mentioned, and made their se award in writing indented under their hands and feals " between the parties, and of and concerning the pre-" mises in the said condition mentioned; by which said " award, produced here in court, the fame arbitrators, " reciting, That whereas the faid David, for and on the Award fet fortha behalf of Jacob Dernyter of Hamborough, merchant,

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and the faid Josiah, by interchangeable obligations, 66 bearing date on the eighth day of November then in-" stant, were bound the one to the other in fix hundred " pounds, conditioned to stand to the award of the said " Maurice Williams, Nicholas Cutler, and Mich. Milford, " or any two of those arbitrators, mutually by them " elected to adjudge, determine, and finally end all and " all manner of action and actions, cause and causes of " actions, fuits, debts, accounts, reckonings, fum and " fums of money, covenants, contracts, promifes, trefse passes, damages, obligations, bills, specialties, judger ments, extents, executions, quarrels, differences, con-" troversies, matters, claims, and demands whatsoever, " which then were, or at any time before the date of " the writing obligatory aforesaid had been moved, stirred " up, or depending between the faid David Debary, (28 " attorney of the faid Jacob Dernyter,) and the faid Johab " Bacon touching the accounts between the faid Johab " Bacon and the faid Jacob Dernyter, so that the award 46 and determination of the faid arbitrators, or of any two " of them, should be made in writing indented, under " their or any two of their hands and feals, ready to be " delivered to the faid parties in difference, requiring the " fame, at or in the then and now dwelling-house of " John Chambers, scrivener, situate in Lombard-ffreet, 66 London, upon or before the faid twenty-first day of November, as by the faid obligations and the conditions " of the same more fully appears; the said Nicholas " Cutler and Michael did award and order the faid David " Debary, his executors, administrators or assigns, on the " part of the faid Jacob Dernyter, to pay or cause to be paid to the said Josiah, his executors, administrators or assigns, the sum of three hundred and forty-sive " pounds fix shillings and ten pence of lawful money of " England, upon or before the second day of January "then next; and they did further award and ordain, that " the faid Josiah Bacon and the faid David Debary, on " the behalf of the faid Jacob Dernyter, upon the payment " of the faid fum of money as aforefaid, should fign and " feal, and lawfully execute and deliver to or for the use " of each of them a good and fufficient release of all and " all manner of action and actions, cause and causes of " action, fuits, debts, accounts, reckonings, fum and fums " of money, covenants, contracts, promises, trespasses, "damages, obligations, bills, specialties, judgments, extents, executions, quarrels, differences, controversies, " matters, claims, and demands whatfoever touching the " faid accounts, as by the faid award appears. " same Josiah in fact saith, That the said award in form " aforefaid

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aforesaid made afterwards, to wit, on the same twenty-
se first day of November in the year aforesaid, at London
" aforesaid, in the parish and ward aforesaid, was deli-
" vered as well to the faid Josiah as to the faid David, Award deliver-
46 according to the form and effect of the condition of ed.
" the writing obligatory aforesaid: And the same Josiah
46 further faith, that although he the faid Josiah, from the
st time of making the award aforefaid, hitherto hath
"well and truly observed, performed, and kept all and
" fingular the matters and things in the faid award con-
" tained on the part of him the said Josiah to be per-
" formed and fulfilled according to the form and effect of
the same award; protesting also that the said David Protestation.
" Debary from the time of making the faid award hither-
" to hath not observed, performed, or fulfilled the award
so aforesaid in any things to be performed and fulfilled
" according to the form and effect of the faid award; the
" same Josiah in fact saith, that the said David Debary Breach assigned.
" did not pay or cause to be paid to the said Josiah the said
" fum of three hundred forty and five pounds fix shil-
" lings and ten pence, upon or before the faid fecond
" day of January, which he then ought to have paid to
46 him, according to the form and effect of the faid
" award: And this he is ready to verify: Wherefore he
coprays judgment and his faid debt, together with his da-
mages by occasion of the detention of that debt, to him
" to be adjudged, &c.
  "Demurrer and joinder, and judgment for the de-
" fendant."
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Pleas before our Lady the Queen at West- [797] minster, of the Term of St. Hilary in the Second Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 450.

# Winter against Garlick.

City of Bristol, "BE it remembered, that heretofore, Salk. 75. to wit, "BE it remembered, that heretofore, Salk. 75. to wit, "It wit, in the term of Easter last "past, before our lady the queen at Westminster came "Edmund Winter by Richard Longford his attorney, and "brought into the court of the said lady the queen then "there his certain bill against Edward Garlick, otherwise called Edward Garlick of the city of Bristol, apothecary, "in

" in the cultody of the marshal, &c. of a plea of debt;

" and there are pledges of profecuting, namely, John Dee and Richard Ree; which faid bill followeth in these " words, that is to say, city of Briffel, to wit, Edmand arbitratica bood. " Winter complains of Edward Garlick, otherwise called " Edward Gar.i. t of the city of Briffel, apothecary, in " the custody of the marshal of the Marshalles of the " lady the queen, before the queen herfelf being, of a es plea, That he render to him one hundred pounds of " lawful money of England, which he oweth to him, and " unjustly detains, for that, to wit, that whereas the " faid Edward, on the nineteenth day of August in the " thirteenth year of the reign of our lord William the "Third, late king of England, &c. at the city of Briffel " in the county of the fame city, by his writing obliga-" tory, sealed with the seal of him the said Edward, and " shewn to the Court of the lady the queen now here, "the date of which is on the same day and year, acknow-" ledged himself to be held and firmly bound to the faid 46 Edmund in the aforesaid one hundred pounds, to be 46 paid to the same Edmund, when he should be thereunto 44 afterwards required: Nevertheless the said Edward, 44 although often requested, &c. hath not vet paid the " said one hundred pounds to the same Edmund, but hath 44 hitherto altogether refused and still doth refuse to pay 46 the same to him, to the damage of him the said Ed-" mund of ten pounds: And therefore he brings suit, &c. " And now at this day, to wit, Monday next after eight days from the day of St. Hilary in this same term, until "which day the faid Edward had leave to imparl to the " faid bill, and then to answer, &c. before the lady the 46 queen at Westminster comes as well the said Edinund " by his faid attorney, as the faid Edward by John Tilla-" dam his attorney; and the faid Edward defends the " force and injury when, &c. and prays over of the writing obligatory aforesaid; and it is read to him, &c. " and he prays also over of the condition of the same "writing; and it is read to him in these words, to wit, "The condition of this obligation is fuch, that if the " above-bounden Edward Garlick, his heirs, executors, "and administrators, for his and their parts and behalf, " do and shall in all things well and truly stand to, obey, " abide, perform, fulfil, and keep the award, order, arbi-" trement, final end and determination of John Hinde of "the city of Briflel aforesaid, Gentleman, and John " Packer of the same city, bell-founder, arbitrators, indif-" ferently named, elected, and chosen as well on the " part and behalf of the above-bounden Edward Garlick, " as of the above-named Edmund Winter, to arbitrate, " award,

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### Pleadings to the Cales.

44 award, order, judge, and determine of and concerning " all and all manner of action and actions, cause and " causes of action, suits, bills, bonds, specialties, judg-46 ments, executions, extents, quarrels, controversies, trefes passes, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, con-" fented, profecuted, done, fuffered, committed, or de-66 pending by and between the faid parties, or either of 66 them, so as the said award be made in writing, and er ready to be delivered to either of the faid parties requiring the same, on or before the eighth hour in the afteron of this present day; but if the said arbitrators do 46 not make such their award of and concerning the pre-66 miles by the time aforefaid, that then if the faid Edward Garlick, his executors and administrators, for his " and their parts and behalfs, do in all things well and " truly stand to, obey, abide, perform, fulfil, and keep " the award, order, arbitrement, umpirage, final end, and " determination of Robert Godfrey, Gentleman, of and concerning the premises, so as the said umpire do make 46 his award or umpirage of and concerning the premifes " in writing, and ready to be delivered to either of the " faid parties requiring the fame, on or before the eighth 66 hour in the afternoon of the day next ensuing the date of these presents, then this obligation to be void, " or elfe to remain in full force, strength, and virtue; " which being read and heard, the same Edward saith "that the faid Edmund ought not to have or maintain his 66 action aforesaid thereupon against him: Because he Pleads no award faith that the aforesaid John Hinde and John Packer, the bitrators, but " arbitrators in the condition aforesaid named, made no that the umpsre 46 award, order, arbitration, conclusion, final end, or de-did-" termination of and in the premifes in the faid condition " above-mentioned, at or before the eighth hour in " the afternoon of the faid ninetcenth day of August " in the thirteenth year abovefaid, being the day of " the date of the writing obligatory aforefaid: But the " same Edward further saith, that the aforesaid Robert "Godfrey the umpire in the same condition likewise " named, having taken upon himself the burden of ar-" bitrating of and concerning the premifes in the faid " condition above specified, afterwards and before the " eighth hour in the afternoon of the day next following "the date of the writing obligatory aforefaid, in the " fame condition specified, to wit, at the eighth hour in " the forenoon of the same day, at the city of Bristol " aforesaid in the county of the same city, made his um-" pirage in writing of and concerning the premifesaforefaid, then and there ready to be delivered to the The unpriage for forth that the

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" parties

defendant should " parties aforesaid in manner and form following; that is pay cost of suit. 65 to fay, that all suits at law then depending between " the aforesaid parties should cease, and be no further " profecuted; and that the faid Edward Garlick should so pay to the faid Edmund Winter, at the then dwelling-" house of Samuel Fitsall, fituate in Caffle-fireet in Briffol " aforesaid, the sum of ten shillings, and the costs of law " which the faid Edmund Winter had been at in that " fuit; and that after the payment of the faid fum of ten " shillings in manner aforesaid, they the said Edmund Winter and Edward Garlick should give to each other " general releases of all actions, suits, controversies, and "demands from the beginning of the world to the nine-" teenth day of the then instant August, in common form; so and the same Edward further saith, that after making "the umpirage aforesaid, and before the day of exhibit-" ing the faid bill of the faid Edmund, to wit, on the "twenty-first day of August, in the thirteenth year afore-" faid, at the faid-dwelling-house of the said Samuel Fitfall, si fituate in Castle-street in Bristol aforesaid, he the same " Edward was ready, and offered to pay to the same Edmund then and there being present the said ten shil-" lings, and to feal, and as his deed to deliver to the " same Edmund a written general release of all actions, " fuits, controversies, and demands, from the beginning " of the world unto the faid nineteenth day of August, in "the umpirage aforefaid mentioned, in common form; " but the said Edmund then and there altogether refused " to receive or accept the faid ten shillings and the faid " written release from the said Edward: And this he is « ready to verify: Wherefore he prays judgment if the 66 faid Edmund ought to have or maintain his faid action " thereupon against him, &c.

Tender and refufal.

Replies and fets forth the cause of action, and levying a plaint.

"And the faid Edmund faith, that he, notwithstanding " any matters by the aforesaid Edward above in his plea " alleged, ought not to be precluded from having his faid " action thereupon against him, because he saith that the " faid Edward, before the faid time of making the writing obligatory aforefaid, at the city of Bristol aforesaid, in the county of the same city, and within the jurisdiction of the Court of our faid late lord the king, held at 44 his faid city of Briffol before the mayor and aldermen of the fame city, falfely and maliciously had faid and " published, concerning the same Edmund, divers false, 66 feigned, scandalous, and malicious words; and the same • Edmund, for the obtaining and recovering damages by occasion of the speaking and publishing of those words, 46 before the faid time of making the writing obligatory 46 aforesaid, levied in the said court of the said late lord

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# Pleadings to the Cases.

the king, held at the city of Bristol aforesaid before the "mayor and aldermen of the city aforesaid, a certain plaint " against the said Edward of a plea of trespass upon the " case, and thereupon such proceedings were had, that the the fame Edmund, at the city of Briffol aforesaid, in expense in the " the county of the same city, paid, expended, and laid wit. "out, in the profecution of the aforefaid plaint against " the faid Edmund, the fum of four pounds five shillings 46 and ten pence of lawful money of England, and there-" upon the same Edmund and Edward for the determina-46 tion of that fuit, and all other demands whatsoever, afterwards, to wit, on the faid nineteenth day of August And their subin the thirteenth year of the reign of the faid late lord award by the 66 the king abovefaid, at the city of Bristol, in the county said bond. of the same city, by their several writings obligatory, by 46 each to the other of them mutually sealed and deliver-" ed, submitted themselves to perform and sulfil the award " of the aforesaid John Hinde and John Packer, or for want thereof the unpirage of the aforesaid Robert God-" frey, that is to fay, the faid Edward by his writing ob-" ligatory in the faid declaration above mentioned; and " the same Edmund in fact saith, that he the said Edmund, " after the making of the umpirage aforesaid by the said " Robert, and before the day of exhibiting the faid bill of "the aforefaid Edmund, to wit, on the faid twenty-first " day of August in the thirteenth year of the reign " of the faid late king abovefaid, at the city of Briftol " aforesaid in the county of the same city, did give no- Notice of his tice to the faid Edward, that he the aforesaid Edmund expence and re-"in profecution of the faid fuit had paid and expended fendant's refuf-" the aforesaid sum of four pounds five shillings and ten ing to pay. " pence, and then and there demanded that money of " the faid Edward; and that the faid Edward at any " time hitherto hath not paid the faid four pounds five " shillings and ten pence to the same Edmund, accord-" ing to the form and effect of the umpirage aforesaid: " And this he is ready to verify: Wherefore he prays " judgment, and his debt aforefaid, together with his " damages by occasion of the detention of that debt, to

" him to be adjudged, &c. " Demurrer and joinder."



# T A B L E

TO THE

### FIRST AND SECOND VOLUMES.

#### Abatement of Adions and Writs.

PRIVILEGE of the defendant not pleadable in abatement after imparlance Page 1 2. In actions qui tam, privilege as attorney of C.B. may be pleaded in abatement 30

3. Privilege of C. B. may be pleaded in abatement, though the narr. be against him in custodia, and bail given

1, 2

Design he had a factorial custodia.

4. But if he be in actual custody in B. R. he cannot plead his privilege of C. B. ibid.

5. And where he is sued as executor or administrator he cannot plead such privilege 2

6. And for a joint cause of action against one privileged, and another not, both must be arrested, and declared against in custodia 544

 If a declaration be delivered against one in custody, he has the whole term to plead in abatement

8. Privilege as attorney of C. B. pleaded, but not faying fuit tempere brewis, respond onster

9. So a plea quod suscepit ordinem militarem, held ill, because not said he was a knight tempore billæ, &c.

10. Declaration against J. G. Knt. he pleads in abatement that he is knight and baronet

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11. Privilege of C. B. pleaded, and that he was not to be fued alibi fans confent; replication that he did confent, held ill for want of a venue Page 4

12. Yet any matter that concerns the person, need not be pleaded with a venue 6

13. To a plea of missioner which traverses the name of baptism, plaintiff may reply he was known by the name in the writ ibid.

14. For the traverse of the name is the point of the plea, but both that and the inducement are material

 A feme covert after arrest and bailbond given, or common bail filed, may plead missomer, &c. 7,8

16. After bail-bond forfeited, defendant cannot plead in abatement to the original action 519

17. Death of either party before the nift print day, abates the fuit, and is not aided by the flatute; aliter if after the commission read, though before trial

 Actions brought by a mayor and commonalty are abated by death of the mayor

19. Where jointenancy is pleaded in abatement, the life of the other jointenant must be averred 32

20. Want of addition, viz. (junior)
pleaded in abatement, held ill because not shewn that senior was in
custod. mar.

Gg 21. And

21. And any matter that diffinguishes
the persons, renders that addition
unnecessary

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22. Alience is pleadable in bar or abatement, and triable where the writ is brought 2

23. And if pleaded in abatement, the replication must conclude to the country; alter if in bar ibid.

24. A writ or bill shall not be abated if not prayed by a proper conclusion of the plea 298

25. In replevin prifel in auter lieu is good in abatement; but if concluded with prayer of a return, it is ill

26. Matter of disability pleadable to the action, shall not be pleaded to the scire facias on the judgment 2

27. Action by two executors, and probate only by one pleaded in abatement, but resp. oufter 3

28. In debt against an executor, plea that he is administrator is not in bar, but abatement 296

- 29. In affimpfit, no plea to fay he was bailiff, and that account lay and not cafe

 In trespass, defendant cannot plead tenancy in common in himfelf in abatement, but may in a stranger

31. In replevin property in a ftranger may be pleaded either in bar or abatement

32. And where in replevin the plea in abatement is to the point of the action, as property is, the defendant shall have a return without avowry

33. But where any collateral matter is pleaded in abatement, no return be fant avowry ibid.

34. In affize, if the defendant plead in abatement, he must plead over in bar at the same time 83

See also, Addition, Misnomer, Privilege, Variance

Abatement of Nuisances, vide tit. Nui-

Acceptance, vide Tender and Refusal.

Accessory, vide Principal.

#### Account.

I. Where an express promise is by a bailist to render account of money, &c. assumpte will lie as well as account Page Q

2. Indebitatus offump. for money received ad computandum: Moved in arielt of judgment, that account lay, and not offumpfit, and held aided after verdick ibid.

 In account the defendant may wage his law, if the receipt was by his own hands, but not if by the hands of another

4. In action of account against one as bailiss, the defendant is to have allowances made him upon the account

5. Since the flature 22 Car. 2. an administrator is bound to account without citation 21c

6. And one entitled to a diffribution by that flatute may fue an adminifirator to prove his account 316

#### Adions in General.

1. Infinity or multiplicity of actions for the fame cause are to be avoided

2. Therefore case lies not for a public nuisance, except some particular damages accrue thereby 12, 16

3. And none can have an action without a particular injury or particular right 16

4. Yet a fingle aft may be a ground for feveral actions where divers are injured thereby 22

5 Alto a person may be twice such for the same act, which may include divers offences

6. As for an affault, &c. indictment lies for breach of the peace, and action for damages to the party ibid.

7. So for adultery, fuit lies in the Spiritual Court, and action at common law for battery of the wife

Bringing an action is not actionable, except fome special collateral wrong be expressly shewn

a. But if one not concerned procure A. to fue B. without cause, B. may may have an action against him Page 14 10. So if one maliciously cause another to be indicted, &c. whereby he is damnified, &c. vide Actions on the Cale 14, 15 11. In all cases where an indebit. assump. lies, debt also lies at election 12. The master of a ship for taking and detaining her, per quod impeditus fuit, &c. may have case for his special damage or trespass Where the action should be case, where trespass, and where the plaintiff bas an election, n. ibid. 13. The plaintiff in one action cannot join his own right and another's 14. Indebitatus to the testator and infimul comput. to the administrator are not joinable ibid. Counts for money received for the use of the testator, and the executor, as such, may be joined, but not contra against an executor, n. ibid. 15. A contract and a tort cannot be joined in the same action

ibid. 16. Therefore affumpfit on the custom of the realm and trover cannot be joined against a carrier

Wherever the same plea can be pleaded, and the same judgment given in two counts, they may be joined in the same declaration, n.

17. Where two joint merchants make B. their factor, and one dies leaving an executor, the executor and furvivor cannot join in an action

18. Tenants in common cannot join as plaintiffs in ejectment 19. Divers members of a corpora-

tion, &c. cannot join in a mandumus to be restored

20. A tenant for years crects a nuisance, and makes an underlease to B. plaintiff may have an action against either

21. But one may have a new action for continuing the same nuisance: For every new dropping, &c. is a new nuilance 10, 11

22. Said, That as a matter ex post

may defeat an action, fo it may give a new one (sed quære) Page 11 23. For after recovery in affault and battery, though it prove a mayhem in consequence, one cannot have battery and mayhem 24. Yet a matter ex poft may abate an action, as where one beats my fervant, and he dies ibid. 25. For in that case actio moritur cum persona 12, 210 26. But where a tort is to a man's property or possession, adio non meritur, &c. 210, 314 27. Where a statute gives a right, the common law gives an action to recover it 28. Where two joint merchants are, and one dies, the action forvives to the other, but not the duty or in-29. Where one releases his right he cannot pursue his action or remedy: But if he has a right and feveral remedies, the discharge of one does not discharge the other 422 30. At common law all actions were

that the jury might be de vicineto 688 Astion on the Case. 1. If one undertakes to do Pthing without hire or reward, no action lies for the nonfeasance 2. But e contra where he enters upon the doing it, and any misfeasance be through his neglect or mifmanagement 3. As where one assumes to take up a hogshead of wine in one cellar and lay it down in another, and lays it down so negligently that it is staved, &c. 4. It lies not by particular persons for a public noilance without fpecial damage (but indicament, &c. 5. As where a common ferry is at L. for the inhabitants to pass toll-free, an action lies for taking toll, but not for keeping up the ferry

6. It lies for not repairing the parti-

Gg 2

tion-wall of a privy, pro defectu

to be laid in the proper county.

cajus filth ran into the plaintiff's 21. Seems if the leffor has only a term Page 22, 360 cellar for years or life, or if a stranger is 7. It lies by the owners for arresting damnified Page 19 a ship by process of the Admiralty 22. If a lessee assigns his whole term, infra corp. com. whereby his voyage and the affiguee burns the house by negligence, that action lies not 13 8. But for stopping a way leading to 23. Contra where he affigus only part the plaintiff's colliery with intent thereof, and it appears he has a to deprive him of the profits, &c. refiduary interest though a special damage was shewn, 24. It lies where a person not conthe Court were divided cerned, procures one to fue another 9. For it is not sufficient to say eufwithout cause 25. So for maliciously causing one to tomers would not come, but must be indicted, whereby he is damnishew they were coming and were hindered thereby fied either in person, reputation, or 10. Lies not by a burgess against a 26. As for maliciously causing, ජිදු constable for refusing to take his per qued he was put to great exvote for a parliament man, per 3 pence, though the indicament was contra Holt 19, 20 11. Nor against an officer for a talfe infufficient 27. So for maliciously causing one to return to parliament, but on the flatute 7, 8 W. 3. wide 21, 503, 504 be indicted of a riot, Ge. after ac-12. Nor against a postmaster for exquittal by verdict chequer bills loft out of a letter 28. But nolle prosegui is not sufficient delivered at the post-office; per 3 evidence to maintain a declaration contra Holt in case of such acquittal But per Helt, an officer is respon-29. It lies not by an administrator fible both for himself and deputies, under the king's letters patent, for whether his trust arise by the commaliciously putting in caveats, per mon law, or by flatute grod, &c. 30. Nor for bringing an action where 14. As innkeepers, carriers, &c, taknothing is due, without some speing rewards, are answerable for those that act under them cial collateral wrong, which must . 15. And whoever takes a public embe shewn 31. In case for maliciously holding to ployment is bound to serve the public, & r. therein special bail, the declaration ought to shew the fum due, and the pro-16. And a deputy is also chargeable cess specially, and that the action is as a wrongdoer, and his act may forfeit the office of the principal determin**e**d 32. Where the grantee of eftovers ibid. may have case against the grantor. 17. It lies by an executor against an and where trespass, vide officer for a false return of a fi. fa. in the testator's lifetime within 4 E. 3. c. 7. Action of the Case on Affumpfits. 18. For by the execution, a right was 1. Indebitatus assumpsit lies in no case vested in the testator, & non moribut where debt lies tur, &c. Contra of meine proceis Vide'n. ibid.

19. It lies for negligently keeping

20. But not for negligently keeping

fire, &c. against a lessee at will, by

mage done

a lessor feiled in fee

his fire in a field, whereby another's corn is burnt, or other da13

ibid.

4. Bat

24, 27, 28

2. But where one receives money to another's use, it lies against the

3. And where one pays money by

mistake on an account, or by any mere deceit, he may have this ac-

receiver

. But not where it is paid knowingly upon an illegal confideration

Page 22 5. Erge not where money is paid by an obligor upon any usurious bond. Vide note to this case ibid.

6. Nor for money delivered to a folicitor, &c. to bribe custom-house officers, &c. and laid out accordingly ibid.

7. It lies for one that pays money on a policy of infurance, believing the thip lost when it is not 2 Z

8. It lies on a promise to pay so much new money in confideration of fo many pieces received of old money

9. So, on a promise to pay 501, in confideration of a note of 50% under a third person's hand, delivered by the plaintiff to the defend-

10. For the note being evidence of a debt due, the parting with it is a good confideration

11. So, in consideration that the plaintiff would receive A. Gc. into his house ut bespites, and find them meat, &c. with an averment that he did receive, &c. though not said ut bespites ibid.

\$2. So in confideration the plaintiff would accept the defendant to be his debtor instead of A. with averment that he did accept, &c and held good after verdict, though no express averment that A. was difcharged

13. But not against B. for money lent A. at B.'s request, because the promise is only collateral

If a person for whose use goods are furnished is liable at all, the parol undertaking of another person is woid, n.

14. Yet it lies against a stranger on his promise to pay the debt if the officer would reftore goods taken on a f. fa.

15. It lies on a conditional promise, as, Prove it, and I will pay you; if fued within fix years

Or, on an acknowledgment the promise of one joint debtor binds the esbers. What is a sufficient promise

or acknowledgment is a question for the jury, D. Page 23 16. It lies by an executor against one that receives money by order of an administrator, i. e. after administration repealed (contra n.) 27 17. So by an executor on a promise to himself for a debt to the teftator, if he declares accordingly 28 18. But if he declares on a promise to the teffator, and the flatute of limitations is pleaded, he cannot give in evidence a promise to himdelf infra sex annos (the plaintiff on fuch plea allowed to amend, n.) ibid. 19. A. living a former wife, marries B. and receives her rents, &c. B. may have indeb. affumpfit against A. for fo much money received to her

ule

General rules and several cases relative to actions for money bad and received, n. 20. It lies where in confideration the

plaintiff promised to marry the defendant, the promised to marry him, because mutual promises 24

Of cases relative to promises of marriage, n. 21. But if the promise be on one side

only, or if that on either fide is not binding, the whole is nudum pallum

22. If one affumes, &c. as action on the case, Numb. 3. and see Baron and Feme, Numb. 8.

See also Bills of Exchange, and Quantum meruit. And for Actions on the Case for Words, vide Words.

#### Actions Popular.

1. An action qui tam on a penal statute will not lie against an attorney of C. B. in any other court 2. For an informer cannot fue where he pleases, though the king himself may

3. And profecutors qui tam are looked on as common informers ibid. 4. Where a statute gives a penalty

to a stranger, and he sues, he is a common informer, and shall pay costs on 18 El. c.

> Gg 3 5. But

g. But where it is to the party grieved he is not a common informer, nor liable to cods by that flatter

Respetting penal and qui tam

373

actions, B. ibid.

6. Ali popular actions on penal flatutes made before 2: Jac. 1. c. 4.

must be brought and prosecuted in

#### Additions.

the proper county

- Addition of place, "c. is not necessary in a writ of bonuse replegiands on the flature 1 H. 5. c. 5. 5. 6. 6
- 2. Nor in any case where process of ontlawry lay not at common law 5
- 3. Ergo not in replevin where such process is only given by statute 25 E. 3. c. 17. 2. ibid.
- 4. And the flature 1 H. 5. touching additions, is to be construed strictly
- g. Ergo it extends not to a novel differin (or other mixed action), though the king shall have a fine, and exigent lies thid.
- 6. And original writ in that statute intends such original as the Court proceeds on ibid.
- 7. Ergo not viconntiels, as replevins, &c. where the proceedings are only on the pluries ibid.
- 8. And where the addition is not in the first writ, if it be in the second or the pluries, it vitiates the writ 6
- o. Any matter that diffinguishes the persons makes the addition of jenior and junior unnecessary 7
- no. As where there are two A. B's. and the writ is against A. B. in suffed. mar. it is well, except shewn that both are in cuffed. mar. ibid.
- 11. And where no tuch addition is, the father (or fenior) is prima facias intended ibid.
- 12. A peer's eldest son cannot in legal proceedings have the addition of his father's second title, though such addition is allowed him in common parlance 451

# Administration, &c.

- Who may grant administrations.
   Every oransary and peculiar may
   Page 40
- 2. And every preuliar is an er nary for this purpole: And for the Bature and kinds or peculiars 41
- Adminiáration originals belorged to the b frop. and Heafir's cafe in q Co. decird 2
- 4. It may be granted by the king, for he is supreme or insry 41
- 5. Where gracted by the lord of a manor, and how to ceclare the e-
- 6. Narr. upon administration graveed per oficiat, peculiar. Ec. debito
  modo commissa, 15 2000, sans no-rment that he had juristicion of
  admin strations
- 7. For where one grants administration wirtute spicit, the plain of need not aver his authority; aliter it by special commission 41
- So in zarr. by an administratir, want of alleging by whom committed is cured by pleading non off fallum, or any plea in chief 37, 38
- 9. But ill on demurrer, for it might be by a peculiar; and then it is uft be averred, cui administrationis commission de jure pertinuis, & c. 38
- 10. To a marr. on administration committed per Ep. L. plea that he was refident in another diccele tempore mortis, is a good bar 37
- 11. Where one has two houses in divers dioceses it shall be granted by the ordinary where he died (2) if ton. notab.)

The decision in this cose was, that a simple contract debt is essets where the debtor (who had two honses) was commorant at the death of the debtor, n.

- 12. Where box, notab. are in feveral diocefes in the same province, the archbishop thereof must grant administration
- 13. But where in one diocese in one province, and in another diocese in another province, each bishop must grant it ibid.

  14. Admi-

14. Administration granted in Dorministrator to prove his account Jet gives no title to administer a Page 316 31. But a creditor cannot fue the judgment had in any court in Westminster Page 40 administration-bond for nonpay-55. Administration is void if granted ment of a debt, for the statute does by a wrong ordinary, but voidable not extend to it 32. Administration granted durante only if granted to a wrong person 38 16 If the intestate dies fans kindred, minoritate of an administrator ceases not till 21. But of an executor it the property is in the ordinary till ceafes at 17 administration granted 33. Administration may be granted 17. And in that case the ordinary during the absence of B. but the might dispose in pics usus, except declaration must aver that B. is letters patent procured as usual absent 34. The cause of action accrues to 18. Where a person dies intestate, the administrator from the time of the ordinary shall commit administration by stat. 31 E. 3. c. 11. 41 administration granted 35. For if A. receives the interest 19. Spiritual Court may grant adminutration to which they will of money, and afterwards administration is granted to B., B. has fix kindred in coual degree 20. Or part to one and part to anoyears from the administration grantther; but of an entire debt it must ed to bring his action (contra of an be to one only executor vide 21) 21. Administration was granted to 36. Yet if he confents to the dethe grandmother, and a mandamus fendant's retaining a chattel beprayed to the Spiritual Court by fore, he cannot have trover after the aunt, but denied administration granted, per 2 contra 22. Administration of the wife's goods 295 must be granted to the husband 37. If sued as executor, he may ylao plead he is administrator, and need 23. But of the hulband's goods, it not traverse that he intermeddled may be either to the wife or next before administration granted 298, of kin, &c. 317 38. But where fued as administrator, 24. A man marrying a feme executrix, &c. the administration is if he pleads he is executor, he devolved on him; and he may must also traverse the dying inbring assumptit on a promise to testate himself without the wife 39. Where an administrator is charg-117 25. Administration cannot be granted as assignee, the judgment is De ed where there is a will and exebonis propriis 40. But where charged as administracutor, though the will be concealed tor, though he might have been or the executor refuse 26. Nor can it be granted though the charged as affiguee, it is only De executor becomes bankrupt, &c. bonis testatoris 41. A judgment against him as execontra if he becomes non compos 36 27. Where it is committed to a debtor cutor may be pleaded in bar to the action is only suspended (vide another action brought against him Executors) as administrator 42. On a writ of inquiry, after an 28. And if to an obligor, though he has a right to receive, and is to interlocutory judgment revived by fci. fa. on 8, 9 W. 3. the final judgment must be against the adpay the money himself, it is no extinguishment .29. Also since the statute 22 Car. 2. ministrator and not the intestate 42 an administrator is bound to ac-43. Administrator under letters pacount without citation tent cannot have case for malici-30. And one entitled to a distribuoully hindering him, by putting in

caveats, 당c. Gg 4

tion by that statute may fue an ad-

44. An administrator impowers A. to receive the intestate's debts, but a will appearing the administration is repealed; the executor may have assume to against A. as for money received to his use Page 27

See also Executors.

#### Admiralty.

- 1. Mariners wages due by parol, are foable there, though the contract on land
- 2. aliter if due by deed or special agreement ibid.
- 3. The mate of a ship may sue the master thereof there for his wages
- 4. But the master cannot sue there on his contract with the owners ibid.

Mate becoming mafter during the voyage allowed to fue in the Admirally for wages in the first capacity, and denied in the last, n. 101d.

5 So where an executor of a mafter fued there for the mafter's wages, a prohibition was granted ibid.

- 6. For though fuit there for mariners wages is allowed by mere indulgence, yet it never was for the masters ibid. and 424
- 7. By their law every contract with the master implies an hypothecation of the ship 34
- 8. But not so by the common law without an express agreement ibid.

  The master bas a right to bypothecate for necessaries or repairs at sea or in a foreign country; but persons supplying the ship with necessaries within the realm, or the master paying for such necessaries, have no lien, n.
- And the mafter by their law may hypothecate the goods as well as the ship ibid.
- 10. And on such hypothecation the matter is suable there, but not the owners

Enter the master or owners may be just for repairs, unless there is a special contract. The Court of Admically has jurisdiction of an hypothecation under feel made beyond fee, n. Page 35 11. The fatute of limitations is

plesdable there to a fait for feamen's wages 424

15. Where it has jurisdiction their sentences bind, and common law courts must observe their determinations 22, 22

The Prize Court in the Admirally has exclusive jurisdiction of all questions relative to coptures by sea or land, n. ibid.

13. Though the Admiralty Court deny a copy of the libel, yet no prohibition till appearance. Contra of the Spiritual Court 553

14 Prohibition cannot be granted to try the validity of their process for appearance, before libel or appearance

15. But if their process be in nature of an execution, prohibition may be before appearance 21, 35

be before appearance 31, 35

16. In a suit there the principal died before sentence, and they proceeded on the sipulation against the sureties. Quere if a prohibition may be

17. See before, in Actions of the Case. Case lies by the owner of a ship for arresting her by admiraltyprocess, Sc. 31

See also Mafter and Servant, poft.

Adversion, vide Presentation, and Quare Impedit.

Affidavits, vide Oatbs.

# Age.

- 1. The minority of an executor ceases at the age of 17. But of an administrator not till 21
- The age for making a will to diffose of goods, chattels, and personal efface, may be at 14 ibid.
- 3. But lands cannot be disposed by will till the age of 21 44
- 4. Yet if one be born 1 Feb. at eleven at night, he may make his will of lands at one in the morning on the last of January in his 21 year

21 year, because the last day of his full age is then begun Page 44

# Agreement and Disagreement.

- An agreement may be either by record or by deed, or by parol (vide Presentation)
- 2. A policy of infurance altered by agreement after it was underwritten, yet good 444

3. And in some cases a parol agreement may avoid a writing if made at the same time 445

4. A goldsmith's note, or bill of exchange, not to be taken as cash, except so expressly agreed by the receiver 124, 442

5. See what agreements are good on parol leases for tithes, &c. 414, 667

See also Bargain and Sale of Goods.

Aiders, vide Principal and Accessary.

# Alebouses.

- 1. To forfeit 10 s. to the poor if they permit any inhabitant to fit tippling above an hour 45
- Before 5, 6 Ed. 6. any person might keep an alehouse fans licence, being a lawful means of living ibid.
- 3. But if diforderly kept it was indictable as a nuisance, and by that flatute two justices (quor. unus) may suppress it ibid.
- 4. And none are now to keep alehouses unless licensed and recognizance given ut ibid, ibid.
- 5. And if any does, he may be committed for three days, and bound with fureties to appear at the seffions ibid.
- 6. That statute does not extend to inns being for entertaining travellers, unless they degenerate to alchouses
- 7. But one that keeps an unlicensed alehouse is not to be indicted, because punishable by the statute otherwise ibid.
- 3. See there the difference between

fuppreffing a licensed and unlicensed alehouse Page 45, 46

9. The seffions cannot suppress an alebouse licensed by two justices 470, 471

#### Aliens and Denixens.

- 1. Turks and Infidels are not perpetui inimici to us, &c. and Justice Brook's opinion denied 46
- For though they differ from us in religion, that does not oblige us to be enemies to their persons ibid.
- 3. They are the creatures of God, of the same species with us, and it is a fin to hurt their persons ibid.
- 4. If an alien enemy come hither fub falvo conductu, he may maintain an action ibid.
- 5. So may an alien amy that lives here under the king's protection, though a war afterwards happen between the two nations ibid.
- 6. So an alien enemy that lives here in peace under protection, may fue a bond, &c. ibid.
- 7. For fuing is but a confequential right of protection; aliter of one commorant beyond fea ibid.
- 8. Also, the feme covert of an alien enemy, the living here under protection is chargeable as a feme sole 116

Allegiance, vide Laws.
Amends, vide Tender, &c.

#### Amendment.

- 1. While the declaration, &c. is in paper, the Court may amend at pleasure, because not within the statutes of amendments 47, 520
- But when it comes to be in parchment, the Court can mend no further than those statutes allow, for it is then a record ibid.
- 3. Stat. 24 E. 3. c. 6. and 8 H. 6. c. 12, 13. are the only statutes of amendments, the others are statutes of jeofails
- 4. Declaration, &c. cannot be amend. ed on demurrer, after entry on the roll 50 5. But

5. But on a plea to the right, or in abatement, it may be reasonable to amend **Page** 50

 Yet declaration against J. G. Knt. on a plea in abatement that he is Knt. and Bart. denied to be amended ibid.

Vide several cases contra, n. ibid.
7. A judgment entered on the plearoll was amended by the paper
book signed by the Master ibid. and

8. Variance between the writ of error and the record refused amendment, though the curfitor's note was right

 For a writ of error is a commission to the judges, and the Court cannot amend their own commission

 At common law no difference as to amendments between civil and criminal cases; contra per flat. 47,

11. A writ of covenant for a fine, being an original, is not amendable by common law or statute 52,53

22. No difference queed bec between actions amicable and adverfary, and 5 Co. 45. Gage's case denied 53

33. Variance between the scire fa. and the judgment not amendable, &c. wide bis 52

24. Where the mift prins roll may be amended by the plea-roll, and where not 58, 49

15. Venire ret. 23 Octob. Distringus tested 24, a discontinuance, and not amendable 51

16. In the distringas the day of nist prius was appointed after the day in bank, and after verdict held not amendable by the plea roll; because the judges authority was confined to that day (vide nots) 48, 43

in the common rule, and the iffue was right in the plea-roll, &c. But the nift prius roll was against five only, and after verdict pro querthis amended by adding the two others.

18. A demise in ejectment laid 1697 for 96, not amendable after verdict,

because it would be another title
Page 48

19. A verdict either general or special may be amended by the clerk of affizes notes in civil cases, but not in criminal 47, 53

20. A special verdid has been amended by the notes of the counsel in the cause, and that after error brought 47,53

brought

21. An information may be amended after plea pleaded, and per Hole after the record sealed up 2.

22. A plea to indictment of murder

amended, after replication and before entry on the roll ibid.

 An information of forgery amended in ten places (not material) without cofts or imparlance 50

24. If a record in B.R. be amended by the record in C. B. the costs (if any) must be given below 49 25. A distringur with a blank for debiti. i. c. the cause of action, a-

biti, i. e. the cause of action, amended after verdict, as no diftringas 454

26. For, want of a diffringes or no diffringes is aided by verdict; contra of an ill diffringes ibid.

27. If the plaintiff moves to amend his declaration the fame term the defendant's plea comes in, he need not give new rules to plead 520

28. After a plea to iffue or demurrer joined, while in paper only, the party may amend his plea, or waive his demurrer ibid.

29. See an appeal amended by firiking out of the count per atternatum fuum 64

30. After judgment by default, and error brought, the declaration was amended by the warrant of attorn. on the top of the roll 88

Amerciaments, V. Fines & 54. Amicus Curiæ. Vide 78, 447, 448.

#### Ancient Demefne.

 Tenants in ancient demeloe are free as to their persons, but not their estates
 The privileges arise from the conflitution and nature of the thing coeval with the government itself

Page 57
3. They are supposed to commence by act of parliament; for they cannot now be created by grant ibid.

 When triable by the record of Domefday-Book, and when by the country ibid.

 Ancient demesse is land under the title of terra regis in that book, and none other ibid.

 Ancient demesse lands held of a manor in ancient demesse, are only impleadable in the lord's court there

 But where parcel of the manor only is ancient demesse, there the particular lands may be impleaded an the king's court ibid.

Ancient demesses can only be pleaded upon a full assidavit. It is not a good plea if the lessor of the plaintiss only claims a term, n. ibid.

8. By a recovery at common law, ancient demeine becomes frank free, until reverled 57

9 Deceit lies for levying a fine of ancient demeine lands 210

# Annuity and Penfion.

1. The king cannot grant an annuity to charge his person, for his person is not chargeable therewith, though a subject is

 But he may grant it out of his excise or other branch of his revenue, which shall be charged therewith

ibid.

3. A pension out of an appropriation, though by prescription, is suable in the Spiritual Court 58

4. For it could not begin but by the grant and institution of spiritual persons ibid.

 And whether granted by the bifhop's ordinance, or by his concurrence with the patron, the church itself is charged ibid.

 Yet such annuity, &c. cannot be released to the ordinary, because it is temporal

# Appeal.

I. The plaintiff in appeal of murder, &c. must count in person, and cannot by attorney Page 62, 64

2. And if he be not present, he may be demanded and nonsuited ibid.

3. Yet such nonsuit is not peremptory, because before appearance ibid.

4. An appeal is to be arraigned in French; but the roll delivered in is to be in Latin ibid and 61

5. But though it must be commenced in person, it may be prosecuted by attorney, unless where wager of battail lies 62

 And as the plaintiff cannot count, neither can the defendant therein appear or plead by attorney
 Nul tiel parish is a good plea there-

in, but not pleadable by attorney

8. The parish may be named and not the vill; for a parish is not intended to contain more than one vill (2.)

 Erroneous process therein is aided by the desendant's appearance and pleading to iffue ibid.

10. Aliter where he challenges the detect by demurring in abatement,

11. And see No. 1. ib. That an adjournment after a void plea received discontinues the appeal ibid.

12. What is sufficient certainty in a count on an appeal 60

13. On an appeal of murder the party may be bailed by B. R. though convicted of manflaughter 61, 62

14. And on fuch conviction may be allowed his clergy, but shall not be discharged thereupon 6;

15. For his recognizance is to fland till he has discharged the appeal by fci. fa. against the appellant ibid.

16. And see there the proceeding on such sci. sa. and the arraigning of the appeal thereon de nevo ibid.

17. Though the appeal was put fine die, yet no discontinuance, for the certierari continues it 62

 Said, an appeal either by writ or bill, is always arraigned on the plea plea fide, unless it comes in by certierari, and then on the crown-fide Page 62

19. The recognizance for bail in appeal may be either to the king, or appellant, but best to the king or

20. See the manner of pleading the former conviction, &c. on arraigning the appeal de novo ibid.

21. And that a conviction of manflaughter is a good bar therein, though clergy not had by default of the Court 62

22. In a writ of appeal, want of fifteen days inter the tests & ret. cured by pleading in chief ibid.

23. See the case of an infant suing an appeal by guardian, and the under-sheriff committed and fined for delivering the writ to him 176,

# Appearance.

1. Formerly, though a writ was not returned, yet the defendant might appear at the day, either to save a penalty or his inheritance 64

2. A nonsuit before appearance is not peremptory in appeal, &c. ibid.

Appendant, vide Incident.

# Apportionment and Division.

- 1. Where A. by contract subjects himfelf to one action only, it cannot be divided so far as to subject him to two 65
- 2. Ergs indorfee of part of a fum in a bill of exchange cannot have action for that part fans shewing the other part to be satisfied ibid.
- 3. So where the contract is at first entire, it cannot asserwards be divided in an action ibid.
- 4. As where the contract is to pay 100l.

  per annum for his fervice, action
  lies not for three quarters ibid.
- 5. So of a lease for years at 201. per ann. it lies not for any less term than a year ibid.
- And so of other contracts for annuities, wages, debts, &c. the contract cannot be apportioned ibid.
- 7. But if in a lease the babendum be

for years, yet the rent may be apportioned according to the reddendum Page 141

# Apprentices.

 An apprentice cannot be bound nor discharged without deed 68

2. He is not assignable over (except by the custom of London to one of the same trade) 66, 68

 Nor is the mafter's executor bound to provide for an apprentice in hufbandry, on 5 El.

4. Yet the executor is liable in covenant, if he does not instruct an apprentice or find him another master 66, 68

5. Whatever the apprentice gains belongs to a master, and he may have an action for it 68

 A covenant between the maßer and a third person, the servant being no party, makes no apprenticeship

7. Service as apprentice beyond fea, qualifies one to use a trade in England within 5 El. wide bis 67

8. And following a trade for feven years is sufficient without any binding, &c. and 5 El. a hard law 613

And note.

9. Justices may compel a master to take an apprentice, Ge. 67

10. Justices may discharge an apprentice, and also order a restitution of the money given with him ibid. and 400

11. So the Seffions may discharge him by original order there, and order the money to be returned 68, 401

12. An apprentice may gain a fettlement (though the master has none) as a hired servant, by 14 Car. 2.

13. An order by four justices for difcharging an apprentice, &c. good, though the master does not appear

14. But their power to discharge apprentices extends only to such trades as are named in the statute 471, 490

15. And the order of discharge must

be under the hands and seals of four justices of peace Page 470

16. But in certiorari to remove such order the very discharge need not be returned, but only the substance thereof

470

See also Indiaments, Orders, and Seffions.

## Arbitraments.

Where an award creates a new duty, the old is extinguished 69
 But if it only ordains a release to discharge the old duty, it is otherwise ibid.

 An award may be good though no time appointed for performance, per Holt, for the law supplies the time ibid.

4. For whether it be to be on request or tender, or not, the law says it shall be in convenient time ibid.

5. An award that the party or his executors shall release, &c. is good, for either may be used for nonperformance ibid.

6. An award that a fuit in Chancery
shall be dismissed, is good 75

 An award that all fuits shall cease, is good and final; but an award to be nonfuit is not 74, 75

8. An award may be good in part and void in part 74, 83

9. As an award to make general releases of all demands to the time of the award is good for so much as goes to the time of the submission, and void for the residue 74.

10. An award to pay the costs of such a suit is uncertain, contra if to pay such costs as the master shall tax 75

Award to pay costs means costs to be taxed by the master. n. ibid.

Fig. An award that A. shall beg B.'s pardon in such manner and place as B. shall appoint, is void 71

12. Quere if an award of money to be paid to a third person be good, unless it appear to be for the benefit of one of the parties 74

13. An award of a collateral thing in fatisfaction, held a good plea without shewing performance 76
34. Money paid on a void award may

be pleaded or taken as accord with **fatisfaction** 15. An award pleaded as made de & Super træmissis, is not enough, unless it appear to be so in se 16. Quare if an award unperformed, though it gives a new duty, can be a good plea after time of performance elapsed 17. A parol award may be pleaded, ready to be delivered, &c. 18. If an award be pleaded without date, it must be computed from the delivery 19. A submission by A. attorney for -B. concerning accounts inter B. and C. good to bind A. but not B.

An award, if final, is sufficiently mutual, n. ibid.

20. A submission to an award made a rule of Court, though the confent was only conditional

72

21. An award made under a rule of

Court is quast part of the rule 71
22. And on breach of such award, the party may proceed both by action and attachment at the same

tion and attachment at the same time 73.83 The attachment will be discharged if the party is in execution on the

action; and will not be granted if an action has been previously brought, or there is contrariety of evidence, n. ibid.

23. Service of a subpæna held a breach
of a rule of reference made at nisi
prius, and attachment granted, vide
Attachment
73

24. What a good cause to set aside an award made by rule of Court, and what not 71

And vide note ibid.

25. Appointment of an umpire by arbitrators before the time expires for making their award is void 70 The arbitrators may appoint the umpire before they do any other act. If the umpire refuses, they may appoint another, n. ibid.

point another, n. ibid.

26. Yet see where an umpirage may be made before such time is expired, or not 72

27. In what cases such appointment of an empire is revocable, or not 70 28. Oa

- On a reference to three foremen of the jury the regularity of their proceedings examined into Page 73,
- 29. In debt on bond to perform an award, omission in the republication of a void part of the award, is novariance; aliter if not void 72

  Awards construed less strictly than formerly, n. ibid.

See also Attachment.

# Arrest of Judgment.

- 1. There are two forts of matter for which judgment may be arrested, wis. intrinsic and extrinsic 77
- 2. Intrinfic, when some matter appears on the record itself which renders the judgment erroneous ib.
- 3. Extrinsic, when some foreign matter is suggested, which renders the writ not only abateable but abated
- 4. The difference between the old method of pleading and moving in arrest, &c. 77, 78
- 5. And see No. 4. The method at this day of moving in arrest, &c.
- The party has commonly four days after the poftea brought in to move in arrest
- 7. But if the distringus be returnable within term, so that there are not four days between the trial and the end of the term, judgment may be entered, if not arrested that term
- 8. After a capiatar pro fine issued, no arrest of judgment 78

Motion in arrest of judgment on the crown side may be made at any time before sentence, n. ibid.

- Judgmentarrested because more damages recovered than there ought 663
- no. See the entry of an arrest of judgment on a prohibition, where a verdict was for the plaintist 655
- 11. On motion in arrest and rule to stay judgment quousque, &c. and afterwards the Court being divided no judgment could be had

12. In assumpti, after verdict, judgment arrested because nudam pactum Page 364.

13. See a judgment arrefted because more damages given than there ought 663

See also Judgments, Trials, and Verdies.

# Arrest of the Body.

1. Arrest on Sunday is void, and the party may have false imprisonment

In what cases a person may or not be arrested on a Sunday, n. ibid.
2. No arrest can be without actually

touching the body

3. But if the bailiff be prevented from touching, by the party's offering to ftrike with a weapon, it is an affault ibid.

The arrest is sufficiently made if the party submits without being touched. The bailiff need not be the band that arrests, but it must be done by his authority, n. ibid.

- 4. And if the bailiff once touch him in the arreft, he may purfue and break open the house to take him ibid.
- 5. Or he may have an attachment, or return a rescue against him ibid.
- 6. Where there are two theriffs the arrest or neglect of one is the arrest or neglect of both

See also Escape, and 274

Affault, vide Trespass and Arrest 3.
Affemblies unlawful, vide Riots, &c.

# Affets.

- 1. If A. takes a bond for another in trust, and dies, this is not assets in the hand of A.'s executors 70
- So if the obligee affigns over a bond, and covenants not to revoke, and dies, this is not affets in the hands of the obligee's executor ib.
- 3. If the executor of lessee for years enter, & c. no part of the profits but what is above the rent is assets ibid.

4. For

4. For the rent is received by the executor as tertenant, and as appropriated to the use of the lessor Page 79

5. Saere the distinction between legal and equitable assets, and how

507

either are liable

6. And how far lands are liable to pay debts as affets

 Outlawry upon mesne process does not make the debt a lien upon the land ibid.

And bringing debt upon a judgment is no waiver of the lien created by the judgment ibid.

 Where a debtor pays the testator's debt to A. with consent of executor, it is assets; aliter if without consent

and recovers, and then it is affets even before execution ibid. See also Executors and Legacies.

# Affignment.

1. Where the lessor himself cannot maintain covenant, &c. his assignee thall not

2. Erge the affignee of a covenant cannot fee in England for rent referved on lands in Ireland, though payable in London 80, 81

3. The affignee of a reversion, though by fine, cannot have covenant for the rent, &c. without attornment,

4. But see now the statute 4, 5 Annee, c. 16, for amendment of the law in this particular ibid.

5. Lessee assigns to A. A. assigns to B. sans notice to the lessor, yet lessor cannot have covenant against A. for arrears incurred after the assignment of A. Q. 82

A mortgagee who has not entered, is not liable to be fued as assignee. The assignee is discharged by assigning to an insolvent person unless per fraudem, n. ibid.

6. And Kighly's Case in 1 Sid. 338. Raym. 162. 2 Keb. 260. denied ibid.

7. But admitted he may have covenant against A. for rent due before assignment 338

See also Covenant.

# Affixe.

1. The writ in affize may be returnable at any common day, or return day; also the affize may be adjourned Page 82

2. The affize is to be arraigned in French, but cannot be proceeded in before the recognitors appear

3. The defendant nonfuited because not ready to count inflanter on the tenant's demand ibid.

4. But such nonfait not peremptory; for the demandant may have a new affize ibid.

5. If the defendant in affize plead in abatement, he must plead over in bar at the same time 83

 No imparlance allowed therein without a good cause, for it is feftinum remedium ibid.

 And where feveral are defendants it shall be taken by default against such of them as do not appear the first day ibid.

Assumpties, vide ante in Actions on the Caje, &c., and Breach, &c. post.

# Attachment.

I. In cases of awards, though not legally good, attachment lies for nonperformance 83

The manner of obtaining an attachment, n. ibid.

2. Aliter if impossible, but the party is excused only as to that part which is impossible 74, 83

3. It lies not for not performing an award (though made on a rule of Court) without a perfonal demand 83

4. On award of three foremen (though verdick given for fecurity) attachment for the breach 73, 84

5. For contemptuous words of the Court, attachment without a rule to shew cause 84.

Qu. When the contempt is only

fivers to by one witness ibid.

6. When one is taken on attachment for such contempt, Sc., he enters into recognizance to answer inter-

rogatories ibid.

He cannot confest the contempt

without

without answering interrogatories, except in case of a rescue or contempt in face of the Court, n. Page 84

7. On rule to put off trial on payment of costs, no attachment for non-payment 83

 Attachment for a refcue is never granted upon affidavits only; but it must be returned on the writ 586

 See an attachment against a judge of a corporation court, and what a contempt is

See also Sheriff and page 260

## Attainder.

Attainder of high treason by commission on 28 H. 8. c. 15. works corruption of blood

2. But not attainder of piracy, or treason, &c., before the constable and marshal, or admiral ibid.

- 3. One attained for counterfeiting the coin on 8, 9 W. 3. forfeits lands, but corruption of blood is faved ibid.
- 4, So that the forfeiture and the corruption are diffind parts of the penalty, and one may be, and the other not ibid.
- In attainders of felony the forfeiture to the lord is only by way of escheat pro defedutementis ibid.
- 6. And the not deteending is but the confequence or effect of such incapacity ibid.
- 7. But in treason the lands come to the crown as an immediate forfeit-
- are, and not as an escheat ibid.

  8. An executor may bring error to reverse the attainder of the testator

# See also Treason.

# Attorney and Solicitor.

1. The flat. 3 Jac. 1. c. 7. extends only to attornies of the courts at Westminster, and not to attornies of interior courts

86

An attorney must deliver his bill a month before the commencement of the action. The items of the bill cannot be examined on an enquiry or at mili prius, n. ibid.

 That statute may be pleaded to debt and indebit. assump, unless a special promise laid, but then not, nor to an insimul comp. Page 86

 An attorney is not compellable to appear for any one, unless he takes his fee or backs the warrant 87

4. Where an attorney appears for any, the Court will not question his authority, but leaves the party to his action 86

5. Nor shall a judgment be set aside for that he appeared without warrant, if he be sufficient; contra, if insufficient 88

 And his confent to accept an iffue, &c. after judgment figned, binds the client, though contrary to his express order

7. Where an attorney's bill on action brought by his executor shall be referred to the master or not, wide

8. Where writings come to his hands as an attorney, the Court will on motion make a rule to redeliver them

 But where they come to his hands in any other manner, the party must refort to his action ibid.

10. A warrant of attorney for the plaintiff in the principal action cannot extend to the fuit against the bail, but there must be a new warrant

11. A judgment by confession upon a warrant of attorney may be entered in the vacation as of the term precedent, though the defendant died in the vacation 87

 But a post terminum roll cannot be filed without leave of the Court ibid.

13. A memorandum was amended by the warrant of attorney on the fame

14. Till a warrant be filed or entered it is not a matter of record, but one may appoint an attorney in court upon record ibid.

15. See the ancient practice of entering warrants of attorney on a distinct roll, and when altered ibid.

A remittit dampna may be by attorney, but a retraxit must be in propria persona

17. An

27. An attorney defendant may have the venue changed from any other county to Middle fex (wide Barrifter)

Page 668

18. See an attorney fined

515:

See also Abatement, Privilege, Rules of Court, &c.

# Attornment.

 Leffor makes a fecond leafe, and before the first expires levies a fine.
 Attornment by the first lessee to the conusee is sufficient

- 3. Attornment is pleadable without a venue, but triable only where the land lies ibid.
- 4. Upon iffue non concessit, attornment need not be given in evidence
- 5. Affiguee of a reversion though granted by fine, could not have action for rent without attornment 82
- 6. But this now remedied by the statute 4 & 5 Ann. c. 16. for amendment of the law ibid.

#### Andita Querela.

- 1. This in itself is no supersedeas, and therefore execution may be taken forth, unless a supersedeas be actually sued
- 2. And if the audita querela be founded on a deed, that must be proved in court before a fupersedeas shall be granted ibid.
- 3. If an audita querela be founded on a record, or the party be in custody, the process upon it is a sci. fa. ibid.
- 4. But if grounded on a matter of fact, or the party not in custody, the process is a wenire and distress infinite ibid.
- 5. Where the party is in execution, he may either have a fci. fa. or venitre ibid.
- 6. Where two nichils are returned, the Court will relieve on motion without an audita querela 93
- y. A on judgment against him ren-Vol. II.

ders himself, but never gives notice to the plaintiff, nor gets the bail discharged, and the plaintiff on sci. fa. gets judgment against the bail, the Court would not relieve them on motion, but put them to their audita querela Page 10t 8. One taken in execution on an audita querela may be bailed 105 See also page 264

#### Averments.

1. Where promifes are mutual, performance or tender, &c. must be averred 112, 172

2. So where one thing is to be done
as the confideration of the other in
contract, &c. 113, 171

 Where and in what cases confiderations in assumption must be averred, wide 23, 24, 25, 29

4. Where the replication must conclude to the country, and where with an averment

5. Where joint-tenancy is pleaded in abatement, the life of the other joint-tenant not named must be averred 32

On administration granted to A. during the absence of B., the narr. must aver that B. is absent 42

 Where an award is pleaded to be made before the day, ready to be delivered need not be averted 69

8. A parol award may be pleaded with averment of ready to be deliwered, &c.

9. Where uses may be averred by parol or not, vide 676

10. No averment can be admitted of a trust to superstitious uses by the statute of frauds

11. Any matter out of a deed that alters the case cannot be averred 197

12. Nor is any averment to be received against the express words of a deed or will 227

13. Where a matter is averred to be within the jurisdiction, the desendant must plead to the jurisdiction, or else is estopped 202

14. See of averments in indicaments on 5 Eliz, that it was a trade at the time of the act 611

Hh 15. Where

15. Where uses may be averred, wide Page 676, 678

See also Declarations, Estoppel, and Pleadings.

Avowry, vide Reflevin.

## Authority.

- It is effential to a deputy to have the fame power with his principal
- 2. And a covenant or condition to restrain such power is void 96

 And he may do all acts that his principal could, except making a deputy ibid.

- But though he cannot make a deputy as to his whole power, yet he may impower him to do particular acts ibid.
- As a deputy-fleward of a courtbaron may impower another to hold a court, take furrenders, &c.
   96, 97
- 6. And such under-deputy may either act in his own name, or else, reciting his authority, act in the name of the deputy or principal

7. Except an under-sherist, who must act in the high sherist's name, because the writs are so directed, &c.

 The acts of a steward de facto are sufficient among tenants of a manor ibid.

Authority given by letter of attorney may be either general or special ibid.

And though particular authorities cannot be varied from in matter of lubstance ibid. and 658

11. Yet if only a variance in circumflance it may be good 97

12. Principal officer answerable both to himself and deputy 18, 19

13. Yet the deputy is also chargeable as a wrong-deer ibid.

14. Where an authority is given to justices of peace it must be exactly pursued 475

15. See other kinds of authorities 363, 419, 442, 454, 467, &c.

See also Power.

Aquard, vide Arbitrement.

#### B.

# Bail in Civil Cafes.

3. SEE the rules of practice about putting in bail and excepting thereto Fage 89

2. In debt on bond, though the defendant fays it was usurious, or per dures, it shall not excuse from special bail

3. Special bail in indebit. affump., so for money won at play, per Holt contra 2 thid.

4. But not in debt on bond to perform covenants, yet with respect to the breaches and the damage thereby (the measure of which shall be taken from the plaintiff's oath) it may

5. In B. R., if the sum recovered exceed the sum in the ac estiam billa, the bail is not liable 102

To what extent bail are liable, n. ibid.

On removal by babeas corpus special bail must be given in here, except in cases of executors

7. But on fuch removal the Court will examine the cause of action, and take bail accordingly ibid.

 And on removal out of an inferior court, the plaintiff is bound to accept the bail below, except in Lesdon

For the sufficiency of bail in London
is at the peril of the clerk who is
responsible, and the plaintiff cannot except there ibid.

10. Yet in debt against executor on a judgment suggesting a devastawit, he shall give bail; for there the action is in the debet & detinet

11. And on removal by babeas corpus where special bail was below, he shall give bail to appear within two terms, but not to pay the condemnation

12. On error in parliament of a judgment affirmed in B. R. new bail is required 97

13. For the first bail does not extend to costs assessed in the House of Lords Lords, therefore a new recognizance is to be Page 97 14. One charged in custody of the sheriffs of L. was discharged on common bail for want of proceeding in two terms, by 4, 5 W. 3.

15. In an action on a replevin-bond common bail shall be admitted 99
16. The merits of the case not to be examined into upon bailing wide

fupra 7.)

There is a difference between the King's Bench and Common Pleas in this respect, n. ib. Qu. tamen, & vide Cooke v. Bobree, H. Bl. 10.

17. If the sheriff takes insufficient bail for appearance, and the plaintiff resuse it, he is liable to an action, and may be also amerced 90 cm. A decided to a second to the second to

18. The sheriff may take bail-bond on attachment for contempt, but the profecutor may refuse to accept it 608

19. But if in either case the plaintisf
take an affignment of the bail-bond
(though insufficient) the Court will
not amerce

20. A. recovers in three actions where were three bails, the defendant rendered himself, and one of the bails entered an exoneratur on the bail-piece; this does not discharge the rest till exoneratur entered for them also

How to obtain an exoneratur, n

- ibid.

  21. So A. on judgment against him renders himself, but gives the plaintiff no notice, nor discharges the bail-piece; and the plaintiff on soi, su, gets judgment against the bail, and the Court would not relieve because no exoneratur entered
- 22. Though a render before return of the latitat is not pleadable to an action on a recognizance of bail ibid.
  Within aubat time principal may be rendered to discharge the bail.
  Suing on recognizance in a different court will not restrain the time, n. ibid.
- 23. Yet the Court ex efficie allowed it on the latitat, as well as on a fci fa.,

and denied the case of Miles and Bateman, 3 Keb. Page 101
24. And note, render in discharge of bail in an action will not discharge the bail on an indicament

# Bail in Criminal Cafes.

- 1. One committed for treason or felony is to enter his prayer on the babeas corpus act, to be tried the first week of the term or day of seftions after his commitment
- 2. But if an act suspends the power of bailing for a time, there he need not enter his prayer till the first week in term or day of sessions after the expiration of such act 103

3. Yet Lord Aylesbury was bailed though no prayer entered in time, because long imprisoned, trial delayed, and life in danger 104

4. One committed for aiding an escape of D, committed for treafon, was bailed for default of profecution

5. One indicted of murder ought not to be bailed upon affidavits of the evidence

6. But one found guilty of murder by the coroner's inquest only is bailable, contra if indicted ibid.

7. One indicted of murder, and found guilty of manslaughter, not bailable before clergy had 103

8. Yet Lifte, who was indicted of murder and found guilty of man-flaughter, was bailed before clergy had ibid.

9. So in appeal of murder and found guilty of manslaughter, one was bailed before clergy, 2. 61, 62

10. M. committed for lorging indorsements on bank-bills, bailed, on a kabcas corpus, because only a great missemeanor 104

11. But upon error of a conviction for a forcible detainer, the defendant was refused to be bailed 106

12. Because in execution for the fine, i. e. 100 l., though the long vacation coming on ibid.

13. Yet one taken on excom. cap. is bailable, while the ret. of the ha-H h 2 beas heas cerpus is under confideration
Page 105
14. See there the manner of entry of
fuch bail, and condition of the recognizance ibid.
15. But bailing during confideration,
(as 13.) is differentiary, and the
court will refuse it if he pleads a
false plea

# Bailiff.

 A corporation aggregate may appoint a bailiff to diffrain without deed

2. In replevin, if the defendant makes constance, or justifies a bailiff to J. S. a traverse of the command of J. S. is sufficient roy 3. So in trespass for taking cattle or goods, for in those cases, though J. & may have a right to take the

cattle, Gc. yet a ftranger cannot justify the taking bat by his command, Gc.

4. But aliter in trespass quare clausum fregit; for there, though the defendant justisses as bailiss, or by command of J. S. the plaintiss shall not traverie the command, because it would admit the truth of all the rest of the plea ibid.

5. In trespans on a justification as bailiff to a court leet for levying an americement, some estreat of the court or warrant of the steward must be shewn ibid.

6. Note, in replevin the bailiff is an actor, and stall recover upon the merits

 But in trefpas the bailiff is only to excuse the wrong, and recovers nothing ibid.

Bakers, vide Weights and Measures.

#### Bankrupts

 An innkeeper held not within any of the flatutes about bankrupts, though also a part owner of a ship

An innkeeper felling liquors out of the boufe to any person who applies, is within the bankrupt laws, n. ib. 2. So a buying and selling under a

particular refiraint is not within the flatute Pege 110 3. But an English subject trading from

foreign parts may be a bankrupt ibid.

Any perfen trading to England, and being there occasionally, may be made a bankrupt on an all committed in England, n. ibid.

4. If a defendant renders himself in discharge of bail, and lies two months, he is a bankrupt from the arrest

5. Yet adjudged though lying in prison upon arrest makes a bankrupt, it is otherwise if he puts in hail to

6. Outlawry, after an act of bankruptcy committed, shall not defeat the interest the creditors have acquired in his estate to8

 Yet a purchaser after shall not be impeached by a commission seed five years after the bankruptcy 100.

8. A plain act of bankruptcy cannot be purged by dealing afterwards; aliter if doubtful only, (and note accordingly,)

 An affiguee has preparty by relation from the time of the bankruptcy, fo as to avoid all meine acts

Note of case concerning the relasion to the all of bankruptcy ibid.

10. See the judges resolutions on the stat. 4 & 5 Ann. against frauds committed by bankrupts 111, 112

11. A mortgagor or purchaser precedent, though by a desective conveyance, to be preserved before

# Bargain and Sale of Goods.

the affiguees of bankruptcy

 Earnest only binds the bargain, and gives the buyer a right to demand the goods

2. But notwithstanding earness, the money is to be paid on setching away the goods; and a demand fans payment is void ibid.

 And if the buyer does not come to pay, the feller ought to go and request him, and if then he does not pay, &c. in convenient time, the agreement is disloved ibid.

4. Where

- 4. Where one thing is to be the confideration of the other, though there be mutual promifes, performance must be averred Page 112
- 5. As if I fell you my horse upon your paying me 10%. I cannot have the money without a delivery or tender of the horse, nor you my horse without averring payment or tender and resusal of the money
- 6. So where mutual promises are to transfer stock on payment of so much money
- 7. But aliter where a time is limited for the performance on one part 113, 171, 172
- 8. If A. and B. come to a shop, and A. says to the seller, let B. have such and such goods, and I will see you paid, &c. the law intends A. to be the buyer, and B. to act but as A.'s servant 23, 28

## Baron de Peers.

# Baren and Feme.

- a. Action against a feme covert allowed good, her husband being alien enemy and in France: for a divorce shall be intended 116
  - In what cases a seme covert may be sued quali sole by reason of a separate maintenance, &c. n. ibid.

Feme covert after separation, and the bushand gone abroad, liable to be made a bankrupt, n, ibid.

- 2. The hushand held liable to the wife's contract as a separate trader, &c. because they cohabited, per Holt
- 3. Wife cannot charge her husband after notorious separation, though by consent and separate allowance,
- 4. Nor is he bound by her contracts, or liable even for necessaries, after a notorious elopement, unless he take her again 116, 119
- 5. But if he turns her away he gives her credit for necessaries wherever the goes, per Holt

Note respecting the liability of a bulband to answer for necessaries for bis wife ibid.

- 6. And while they cohabit he shall answer her contracts, &c. for by cohabiting his affent is presumed, per eundem Page 118
- 7. Contra where the husband expressly disassess beforehand, by notice to the owner or his servant, per cundem
- 8. If she takes up materials, as silks, &c. and pawns them before made into clothes, he is not liable; for they never came to his use. Contra if made up and worn, per Hole
- Action lies not on a promife of marriage, except the contract is mutual, for otherwise it was only nudum passum 24

Note respecting promises of marriage ibid.

- 10. À contract of marriage per verba de præsenti is a marriage de facto
- 437, 438

  11. And whether per werba de prafenti or de futuro is cognizible in
  the spiritual court, and their sentence is binding

  437
- 12. Yet held that marriage by a mere layman was void, and a cohabitation thereupon did not entitle the man to administration of the woman's goods
- ig. For on his demanding a right due to husbands by the ecclesiatical law, he must prove himself a husband by the same law 120
- 14. Quere in case of such husband's death, if it shall entitle the seme and issue to a distribution ibid.
- and inue to a distribution toid.

  15. Note, the form of pleading a marriage is, That it was per pref-byterum facris ordinibus conflict.
- 16. Yet in debt by baron and feme nunques accomple, &c. is no plea, for a marriage de facto is sufficient 437
- a marriage after the parties are dead, because they proceed pro salute anima.
- 18. Yet evidence at common law was admitted to bastardize a peer, even after the death of himself and parents (durum) 120, 121
- 19. The husband may release costs adjudged to the wife in the spiritual H h 3 court.

court, un'est a separation be, and alimony allowed Page 115
20. He alone muit bring the estion for work done by her during coverture, unless an express promise be made to ber

Where the wife may, mast or may not join in actions on contract, nibid.

21. And the advantage of such work shall not survive to her, but go to the husband's executors ibid.

22. But money earned by her living feparate shall go towards her own maintenance 113

23. Trover by baron and feme, ad dampnum of both, held naught after verdick; for the possession and property of the wife is veited in the husband.

Where the wife may join in trover or reflevin, n. ibid.

Trestals against turon and seme for taking goods and converting ad usum iplorum, good id. ib.

2.1. But trespass by him for imprisonment of the wife, per quod negetia wiri infetta reman, ad damp. of both, held well after verdict

In what actions relative to the person of the wife she may, must, or may not be joined, n. ibid.

 For matter may be alleged in aggravation of damages, for which no action will lie ibid.

26. Hushand of a feme executrix gives a new day to the testator's debtor, who then makes a new promise, &c. he may bring assumpfit thereon withou: joining the wife

27. But if he dies before recovery the is reflored to her former right, for the duty was not extinguished by the new promife isid.

28. A fci. fa. by baron and feme on a judgment recovered by her wille fole, if after execution awarded, the dies, it furvives to the hufband

29. In an action against baron and feme he shall give bail for appearance both for him and his wife 115 Where the wife being arrested, or

taken in executiva, is difebarged or not, n. Page 215 A fine covert obtaining credit quali fale not relieved on motion is ivid.

30. But where one action against the husband only, he cannot declare against him and his wife ibid.

31. In an action against both for a battery by the wife while he was in prison, a declaration cannot be demanded at the prison against him & ax., but process must be seed against the wife, and the arrested 114

32. The wife may justify an assault in desence of her husband 407, 437

33. Husband and wife covenant to levy a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, is void 675

34. A. marries B. living a former wife, and receives her rents, &c. B. may have indeb. affump. as for money received to her use, the husband having no right to receive it, &c.

35. A covenant before marriage to release the wife's guardian after, set aside in equity 158

36. If baren and feme declare on indeb. affump. to them as executors on a nonfuit, they shall pay costs 207
37. A warrant, Se. by a feme fole, is revoked by her marriage after

# Barretry, vide Ufary.

399

## Bargisters at Law.

1. If a defendant be a barrifter or attorney, &c. attending the court, he may have the venue changed to Middlesex from any other county 668

2. Also a trial at bar is feldom denied to any gentleman at the bar or officer of the courc 651

# Bajtard.

1. The rule that none shall be bastard zed after his death holds only in case of bastard eigns and mulier puisse (vide Baron and Feme) 17, 18, 120, 121
2. But

2. But the spiritual court cannot annul a marriage, or bastardize issue after the party's death Page 548 3. A child begotten after divorce a mensa & thore only shall be taken to be a baitard A. Aliter after a voluntary separation, unless found that the busband had no access ibid. 5. So if the husband be beyond sea during the whole time of her going with child, it is a baftard 122, 534 6. Contra if he were here at all during that time, for then access would be presumed 122 Any proof of non-access is sufficient, n. 7. A baftard child is generally to be fettled where it is born 8. But if born in B. pending an illegal order for removing the mother thither, it is no settlement there 121, 474, 532 9. Nor does the justice's order for maintenance determine the bastard's settlement. 10. Money may be ordered to be paid to the overfeers for maintenance of a bastard child 11. Justices may order payment of a fum in gross for that purpose 124 12. Order to pay so much per week till it be fourteen years old, is ill 121, 478 They must reside with their mothers till seven years old, but the parish where they are settled is liable to an order for their maintenance, n. ib. 13. Order for maintenance quashed because the words of adjudication were in the fingular number for the plural 14. An order of baftardy under the hands of more than two justices is good, if one of them be of the quo-THE 15. From an order of bastardy the appeal must be to the next quarter**feffions** 48z The decision was to the next general sessions, and its being to a quartersessions was beld insufficient, unless it appeared that no general sessions in-

terwened; but the contrary has been

16. Viz. To the next (quarter) fef-

ibid.

fince ruled, n.

fions after notice to the reputed father of the first order, bastards are settled where born P. 480, 485 Baftards are fettled where born 482 17. On motion to quash an order of bastardy, the reputed father must be present in court 18. By 28 El. c. 3. fessions must proceed on the reputed father's recognizance 19. But by 3 Car. 1. c. they may commit him, &c. ibid. 20. Stat 13, 14 Car. 2. c. 12. fect. 21. relates to the maintenance of poor children not bastards Bill of Exceptions, vide Trial.

Bills of Exchange. 2. At common law the drawer was not chargeable unless he had notice of the drawee's non-payment in convenient time What notice must be given, and bow it must be alleged, n. 128 2. And convenient time is to be guided according to the usage of traders and particular circumstances of cales What is reasonable time for prefenting, n. 3. Yet where A. indorses and delivers a bill to B. who keeps it by him long after payable, if not paid he may have assumpfit against A. (vide infra, 19.) 124 4. And the indorsement, delivery and detainer is no evidence that B. accepted it as so much money, unless paid 5. Nor shall a bill so received, &c. go in discharge of a precedent debt, except made part of the contract ibid. Contra per flat. 4 & 5 Ann. vide note 6. As where A. fells goods to B. and agrees to take a bill on C. in fatif-

agrees to take a bit out of the latter faction, there A. is discharged though it be never paid ib. vide 442.

7. A general indeb. afump. will not lie on a bill of exchange for want of a consideration (as value received, &c.)

It lies where there is a privity between the parties, and a consideration, n. ibid.

Hh4 8. But

8. But a special indeb. affump. must be against the drawer, or a special action of the case on the custom of merchants Page 125 o. And drawing of a bill makes a merchant to support the custom in that cafe 125,.445 10. A bill payable to A. or bearer is not assignable to charge the drawer, 125 contra if to A. or order A bill to bearer is assignable, n. ib. 11. But such indorsement charges the indorsor, for the indorsement is in nature of a new bill 12. Trover for a bill payable to A. or bearer, will lie against the finder, &c. but not against the asfignee The innocent bolder of a bill or note which bas been ftolen er left may recover thereon, n. 13. The words, or to bis order, in a bill, gives authority to affign it by indorsement, &c. 14. And the aftigning of a bill, note, Ec. not payable to order, charges the indorsor, but not the drawer, wide pl. 1.1. 25. A blank indorsement on a bill does not transfer the property without some further act 126, 130 16. But fuch indorsement may be filled up by the indorfee fo as to 128 charge the indorsor Wbat liability arises from indorsibid. ing a blank check, n. 17. And so, though the bill be purchased at discount, &c. and so may an acquittance, &c. ibid. 18. Indorsee of part of a sum in a bill, cannot bring an action fans shewing the other part satisfied 65 19. A. indorses two notes in satisfaction of a debt, but before receipt the drawer broke. Quære if the indorfor could be charged (wide 132 sufra, 3.) 20. An indorfor by custom is only liable in default of the first drawer 130, 132 ibid. The law is atherwise, n. 21. Yet faid, the indortor charges himself in the same manner as if he were the drawer 22. See what is necessary to be proved

to charge the indorfor, in an action by the indorfee Page 128 and notes 23. Action lay not on a promiffory note before the statute, and it cannot be laid within the custom of merchants, vide bis 120 24. On a promise (after day of payment) to pay secundum tener. billa. action lies 127, 129 25. So acceptance after day of payment is good, and amounts to a promife to pay generally 129 26. Acceptance by one, where the bill is drawn on two, binds both, if it concerns their joint trade 126 27. A declaration against the drawer is good fans laying an express promise, for by the drawing it is implied 28. In declaration on a first bill, want of averring the second and third not paid is aided after verdict It is not material on demurser, ibid. 29. In declaration on a foreign bill, drawn at two usances, the time of which it confifts must be averred 30. In declaration on inland bills against the drawer, a protest need not be fet forth, nor necessary at common law ibid. On foreign bills it must be alleged and proved; but the want of alleging it is only fatal on special demuribid. rer, n. 31. See the form of a bill of exchange between two persons only 130 32. An assumpsit on a promissory note on the custom of merchants, held ill 24, 129 33. And goldsmiths notes are only a conditional payment without an express consent

# Bonds, vide Obligations. Bishops, Archbishops, &c.

2. The Archbishop has a metropolitical jurisdiction over Bishops by the common law
2. Which was usurped by the Pope, but restored by the statutes of Henry the 8th
3. A

- 3. A Bishop may be punished in the Archbishop's court for any offence against the duty of his office P.134
- 4. A Bishop cited before the Archbishop in person for simony, &c.
- 5. Archbishop or Bishop may judge in person or by their vicar general
- 6. Their courts may punish a temporal offence, if committed in an ecclefiatheal matter, or face of the
- 7. All Bishops are co-ordinate or pares jure divino, but not jure humano
- 2. He that can visit can also deprive, (2) ibid.
- g. On iffue whether a parson be deprived, the court writes to the Bishop 135
- 10. But on iffue whether a Bishop be deprived, it writes to the Archbishop ibid.
- 11. Anciently bishopricks were donative by the King, and conferred by investiture 136
- 12. Translation of Bishops anciently was by postulation to the Pope
- 13. See the manner of creating and translating a Bishop at this day 126
- 14. Four things requisite to complete
  a Bishop, election, confirmation,
  consecration, and installation 137
- 15. Note, his former preferments are void by his confecration and confirmation, not by his election 136
- 36. A Bishop's leafe, if it exceed the statute, is void in toto as to the successor 189
- 27. See the Bishop's power to compel a sequestration 320, 321

See also Administrator and Presenta-

Breach in Covenant, Debt, Cafe, &c.

- I. A. and B. dimiserunt imports a joint covenant as to the interest granted \$137
- 2. But it may be several with respect to subsequent acts

  138

  Breach may be affigued in the

- tamount, n. Page 138
- In covenant where a plaintiff affigns feveral breaches, the defendant may traverse them severally ibid.
- 4. In covenant, breach that 3 l. for a year at Lady-day last was arrear, &c. held well on general demurrer
- 5. Covenant not to buy or fell within two years, breach that diverfies diebus & vicibus between such a day and such a day he fold to H. and several others, held well after verdict ibid.
- 6. The heir assigns a breach that the premises were out of repair tali die of per 10 annos ante, which included his ancestor's time, yet held well
- 7. Agreement to convey to H. or his affigns, breach that he did not convey to H. (only) is good 139

  Agreement that A. or his affigus fould, &c. Breach that A. did not sufficient, n. ibid.
- 8. See the diversity between covenant to do an act, to one or affigns, and by one or affigns ibid.
- g. In debt and bond (except to perform an award) where a defendant pleads matter of excuse that admits a non-performance, the plaintiff need not assign a breach in his replication
- 10. And see and note the difference of bonds to perform awards from all others, and the reason thereof ibid.
- 11. Also in debt on bond to perform covenants, the replication must shew a certain breach; but in action of covenant it is enough to afsign a general breach

  140
- 12. Assumpte to deliver corn on or before the 5th of January into a barge, to be brought by the plaintiff; breach, That he did not deliver upon the 5th of January, is good
- 13. In a leafe, if special days of payment are limited by the reddendum, the reat must be computed by that, and not the babendum 141

See also Condition, Covenant, 4, 5.
Bridges,

Bridges, vide Highways.
Buildings, vide Henjes.

## By-Laws.

 A franchife granted, or corporation erected, may be regulated by by-laws, though no fuch power expreffed in their charter Page 142

2. Members are compellable to undergo offices, &c. imposed by a bylaw, even in cases where they be indicted ibid.

3. He that is represented must take notice of the acts of the body representative ibid.

4. A by-law, that all frangers shall employ city-porters, is ill 143

5. But a by-law, that none but freemen shall be city-porters, seems good. 2. ibid.

6. For the freemen are represented by the livery-men, and bound by their acts and by-laws 142

7. Note, Wager of law does not lie in debt for breach of a by-law 682, 683, 684

See also Corporations and London.

## C.

Canon Low. Vide Laws.
Capias Utlagatum. Vide Outlawry.

#### Carrier.

1. HE is liable in respect of his reward, and not of the hundred's being answerable over to him 143

2. For the hundred is made liable
by statute, but he was so at common law
ibid.

3. And the being robbed does not excuse him, because it may be by such combination and consent as cannot be proved ibid.

He is answerable for loss by fire, ibid.

4. A. undertaking to carry goods of all persons indifferently for hire, is a common carrier, &c. 249, 250

5. In what cases trover will lie against him or not, wide 655

6. And where the master of a stage

coach is liable for goods lost by the driver, vide Page 282

# Certiereri, Recorderi.

 Where the certificari is to remove orders, the fact only is figured by the judge

 But where it is to remove indictments, both the writ and the fast must be figned by him idid.

 A certificari generally lies to all inferior jurisdictions, as the court of Ely, and all franchises, Se.

Note from the 6th edit. of Hawk.

 So it lies to the juffices of peace in Wales, and counties palatine, and commissioners of sewers, Se.

5. But not granted to the Old Bailey, nor to any justices of gaol-delivery, unless for special cause 144, 150,

6. A certiorari is like a recorderi, which removes all things pending at any time between the sefts and

7. And it is a fuperfedens to the proceedings infra, for the fame reafon that a babeas corpus is 148

8. But for removing indicaments, Sc. it is not to be allowed without bail; wide the late act 149

9. Nor is it to be ferved after the jury are fworn 144

Nor is it a fuperfedent to an execution begun before the certificant iffued

11. It ought to be to remove both the indictment and conviction, where the defendant is convicted 150

12. But it is not proper after conviction, unless where error lies not, or a fine is to be set in B. R. 149

13. It lies on a judgment given by the censors of the college of physicians for male practice, because error does not lie

14. But a certiorari to remove a conviction of recusancy was denied 145

15. Exceptions are usually taken to orders of sewers removed by certiorari before they are filed ibid.

16. Note; The whole body of commissioners of sewers were laid by the heels for refusing to obey a certiorari /4/4 Page 103.

17. Where it issued to remove a con-

viction of deer stealing, the return wasquashed, being imperfect 146

18. On removal of a conviction for not paying the duty on cyder, the return in English was allowed 149

19. After certiorari to remove inquifition of forcible detainer, the justices cannot award restitution 151

20. A certiorari to remove an indictmen: against A. will not remove one against A. and B. 146

21. So if to remove all orders against A. and B. omitting (or either of them) it will not remove an order against A. only

22. So if to remove an order touching foreign falt, where the order is touching falt, omitting foreign, it is not removed

23. Also the name of the parish in the writ and that in the order removed must appear to be the same

24. For there ought to be no variance between the writ and the order removed 145, 146, 151

25. Also the order itself must be returned in bac verba, and not with cujus quidem tenor sequitur, &c.147,

26. And the return must be made by the justices (to whom the writ is directed) and not by the clerk of the peace 470

27. Note; Orders of justices are not to be removed before the time of appeal expired 147

See also Error, Habeas Corpus, and Sessions.

## Challenge.

T. On a challenge to a juror for favour, two of the jury were sworn as triers. See their oath

s. Where two persons are fherists, and one is challenged, the venire shall be directed to the other ibid.

3. So where two coroners are, if one be challenged the other must act
Page 152

4. A juror may be challenged in criminal cases, if one of those that found the bill of indictment

5. So if the prisoner can prove by others that he said he was guilty or would be hanged, &c.

6. So a juror may on a woire dire be asked whether he hath any interest in the cause, &c. ibid.

7. And in a civil cause, whether he has given his opinion beforehand upon the right, &c. ibid.

 But he cannot be examined to any matter criminal or infamous to himself in order to a challenge ibid.

 It is a good challenge to a juror, that he hath been a juror before in the same cause

## Chancery.

1. In equity, land agreed to be fold fhall go as money; and money agreed to be laid out in land, as land

2. Land fettled in trust to pay debta is discharged as soon as the money is raised, though misapplied by the trustees

3. Where lands are deviced to pay debts, even debts barred by statute of limitations shall be paid therewith

4. For they remain debts in equity, and the flatute has not extinguished the duty though it takes away the remedy at law

Subsequent cases in which this subjed has been discussed. A devise to pay debts held to include one contraded during infancy, the statute of limitations having attached in a petitioning creditor's debt, no har to an adiom by assignees of a bankrups, n. ibid.

 A trustee buying in debts for lefs than is due, shall not be allowed for the whole; aliter of one purchasing in his own right ibid.

 A term created for a special purpole, after that is determined, is attendant attendant on the inheritance P. 154.
7. Remainder of a term limited to daughters after a limitation in tail, if the effate-tail was contingent and never took effect, the daughters shall take, otherwise not vide note)

156, 157

8. A term limited in remainder after the father's death in truft for raising daughters portions at age or marriage: When either happens, the portions are to be raised in the father's lifetime

g. So where limited to take effect in case the father dies without issuemale by his then wife, and she dies without such issue in his lifetime, the portions are to be then raised

The inclination of the Courts is against raising portions in the father's lifetime—Cases to that purpose, n. ibid.

 But in no case shall the portions be raised before the contingency on which it is founded

11. A bond given to refund part of the portion without the father's (husband's) privity is void 156

Treaties infringing the public treaty of marriage are woid, n. ibid.

12. So a covenant before marriage to release the wife's guardian of all mesne profits within two days after

fet aside

Grants and releases to gnardians,
&c. set aside, n. ibid.

13. Lands were devised to J. S. paying the heir 20,000 l. within twenty years by 1000 l. per annum.

The heir entered for nonpayment as a forseiture, and the devisee relieved

14. For wherever equity can give fatisfaction for breach of a condition, they can relieve against a forfeiture

15. And that for every 1000 l. not paid, the heir or legatee shall have interest from the time it was payable

16. And no deduction for any taxes, because it is not to iffue or arise out of the lands, but 1000 l, per annum is given as a sum in gross 156

17. A legacy is generally to be taken as a free gift, and not as a payment of debt Page 155, 508

 A legacy to a creditor greater or less than his debt, how to be taken it.

19. Payment of interest to a scrivener
on a mortgage is good, if he has
the bond or mortgage-deed
157
20. And so is payment of the principal

 And so is payment of the principal on a bond, if he deliver up the bond ibid.

21. But it is otherwise of a mortgage, for there he has authority only to receive the interest isid.

22. And if the mortgages agree it is good during his life, though the ferivener has neither bond nor deed ibid.

23. And so it is after his death if the executor agrees either expressly or by implication ibid.

24. A mortgage does not revoke a will in toto, but fevers the joint-tenancy of the trust of a term 158 25. That a joint-tenancy is an odioes thing in equity ibid.

26. Merchants goods in the hands of a factor not liable to debts of a faperior nature 160

Goods in the bands of a perfen as an executor-truftee, &cc., are not affelled by his bankruptey or an execution against him, n. ibid.

Nor money, where it can be speciscally distinguished, id. ibid. 27. Otherwise of money in the fac-

tor's hands
161
28. Executor must pay debts of a

higher nature after a decree quod computet, not after a final 507 29. Injunction against pulling down

a castle granted against tenant for life dispunishable for waste 162 30. Bill there to foreclose a mortgage admitted, though the lands lay out

of the jurisdiction of the Court 404
31. Non performance of a condition precedent to the taking of an estate not relievable there; alies if forfeited

231, 232

32. Chancery agit in personam, though lands be entra jurisdictionem 404. See also Charitable Uses, Devises, Mortgages, Truste, &cc.

Chaplain-

# Chaplain.

- 1. The king's chaptain extraordinary not capable of a plurality within 21 H. 8. c. 13, 14. Page 161
- A dispensation is not necessary where the king presents his chaplain to a second benefice ibid.
- 3. A chaplain extraordinary has no waiting time, &c., but only his name entered in the book of chaplains
- 4. A chaplain within 21 H. 8. must be retained under seal, &c. ibid.

And fee Parfon, Vicar and Curate.

# Charitable Uses, &c.

- 1. To a bill for charitable uses all the tertenants need not be made parties 163
- Devise of lands to charitable uses not in writing, or not having three witnesses, is void ibid.
- And the flatute 43 El., which favoured appointment to charities, is repealed pro tanto by the flatute of frauds ibid.
- 4. Devise to superflitious uses is void, but neither the king nor the heir shall have it ibid.
- But the king may apply it to a proper use, i. e. as a charitable devise ibid.

Devise to charitable uses void, n. ibid.

- 6. No averment can be admitted of a superstitious use by the statute of frauds 162
- 7. But devices in trust for superstitions uses are discoverable by informations in the Exchequer ibid.
- 8. The statute of frauds did not bind the king as to appointment of superstitious uses, &c. 162, 163
  Qu. per Lord Hardwicke, n. ibid.

# Churches, Chapels, Churchwardens,

- P. One that only occupies lands in a parish is taxable in a rate for bells,
- a. Inhabitants of a chapelry are liable

- to repairs of the mother church, unless exempt by custom Page 164,
- 3. Aliter where it is a late erection in ease and favour of those of the chapelry 165
- 4. By the common law the parishioners are to repair the church, but by canon law the parson 164.
- 5. The parishioners are bound to repair the church, but the chancel is to be by the parson ibid.
- But in London the parishioners repair both church and chancel, though the freehold is in the parfon
- 7. Church rates are to be affested by the parishioners, and not by the churchwardens (vide Fares. 69.)
- Union of churches was at common law, i. e. by concurrence of the parson, patron, and ordinary ibid.
- 9. But union of parishes is by statute. Vide stat. 22 Car. 2.c. 11. Sc. ibid.
- 10. By union of churches the ancient church or rectory, and the incumbency, feem to be extinct ibid.
- 11. Entire neglect of going to church is punishable in the Spiritual Court
- 12. But quære if one is suable there for not going to his own parish-church
- Return to a mandamus for swearing in a churchwarden being insufficient, a peremptory mandamus was granted ibid.
- 14. Parishioners cannot prescribe to dispose of pews exclusive of the ordinary 167

  Note contra ibid.

# Church of England, Religion, Diffenters, &c.

- 1. On information for refusing to take on him the office of sheriff, adjudged, diffenters are not exempted by the toleration from doing what is necessary to qualify themselves for public offices 167
- 2. Ergs not exempted from taking the oaths and facrament according to 13 Car. 2. Sc. 167
- 3. For the king has an interest in the persons

persons of his subjects, and a right to demand their service Page 168 4. And none can be exempted from

the office of theriff unless by that ute or by charter ibid.

A dissenter not bawing taken the facrament is not compellable to undertake the office of fheriff, n. ibid.

5. The toleration act is a private statute, and not taken notice of by the Court unless pleaded ibid. & 674

Declared by flatute to be a public act, n. 168

6. A licence to a differting minister inrolled in one county does not extend to another 572, 673

Clerks of Assize, the Peace, &c. vide Offices.

Collation and Laple, vide Adverson, Bishops, Presentation, &c.

Commission, vide Authority.

Commitment, vide Attachment and Habeas Corpus.

#### Common.

- A farmer is to be taxed for common appendant in the parish where the farm lies 163
- 2. One may prescribe for common appendant to his cottage ibid.
- 3. How a copyholder shall make title to common within or without the
- 4. Where it is out of the manor, though he infranchife his copyhold the common remains 171
- 5. But where within the manor, it belongs to his estate, and infranchisement extinguishes the common (2.)

  171, 366

Common Recovery, vide Recovery.

Common Informer, vide Indiaments, &c.

Computation, vide Age, Day, and Term Time.

#### Condition.

1. A condition made impossible by the act of God cannot be broken

Page 170

See the nature and effect of a condition precedent 171, 231
 An agreement that d. shall do,

and for the doing B. shall pay, the latter is a condition precedent

The general nature of covernants, as being independent conditions precedent, or mutual, n. 1714. But where a time is fixed for the payment, it will vary the construction 113, 171

tion 113, 171 5. A release of all demands will not release a promise unbroken, or a

release a promise unbroken, or a future act 171 6. A condition is to be construed as

an agreement according to the intent of the parties 113, 171, 172.

7. Where a condition is underwritten or indorfed, if it be void the obli-

or indorfed, if it be void the obligation remains fingle 172 8. But where it is incorporated, and

made one with the lieu itself, if it be impossible the whole is void ibit.

9. Condition to exhibit an inventory into the Spiritual Court before such a day, the desendant in excuse most not only plead that no Court was held, but also that he was there ready ibid.

10. Where a condition is precedent to the taking of an effate, non-performance differs from a forfeiture thereof in equity 231, 232

See also Obligation.

# Confession.

1. A verdict for the plaintiff fet aide, and judgment entered by confession on the matter of the plea 173

 After a frivolous pleafudgment may be entered as by confession, aliter if only mispleaded ibid.

# Confirmation.

A new charter may be used as a new grant, or as a confirmation 168 Conquest. Conquest, vide Law.

Consent, vide Agreement.

Consideration, vide Assumpsit, and p. 422.

# Conspiracy.

 A conspiracy, though nothing done in pursuance of it, is an offence, and that whether it be to charge one with an offence temporal or spiritual Page 174

And the bare meeting and confulting to charge fallely an innocent person is indicable ibid.

3. And in the indictment it need not be averred that the party is innocent, for to charge falfely is tantamount ibid.

Not necessary to flate falsely, n. ib.

4. The venue therein must be where
the conspiracy was, and not where
put in execution ibid.

5. And confederacies, &c. are one of the articles to be inquired in the commission of oyer and terminer ibid.

Constable and Marshal, vide Marshal.

# Constables.

- 1. The High Conftable was an officer at common law before the stat. of Winton, as well as the petty constable 175, 581
- 2. And are officers to the justices of peace as the sheriff is to the Court of B. R. (2.) ibid.
- Both high and petty constables are removable, and the justices in sefsions are the best judges of that matter
- A conflable chosen at the leet is bound to serve under a penalty 175
   But such penalty cannot be dis-
- trained for, fansexpress custom ibid.
- 6. Regularly he is to be chosen in the leet or turn, but may be in a corporation by custom 502
- 7. Sessions of the peace may appoint a constable ibid.
- 8. The constable of A. takes an oath

(on fale of a distress) in B. and held well Page 247
9. If a warrant be directed to a confable by his name, he may execute it out of his precinct 176

Qu. Whether it is necessary that the direction should be by name ibid. 10. He is indictable for neglecting his duty required either by common law or statute 380

Construction of Words, &c. vide Exposition.

Confultation, vide Probibition.

Contempt, vide Attachment, page 429. Contrads, vide Agreement, Bargain and Sale, Breach, &c.

## Continuance and Discontinuauce.

- A wrong conclusion of prayer of judgment in a replication makes a discontinuance
- If a plea to the whole answers but to part, the whole plea is naught, and the plaintiff may demur ibid.
- But if a plea to part answers only to part, it is a discontinuance, and the plaintiff must take judgment for the rest
   94, 177
- 4. And where the plea is only to part, if the plaintiff do not take judgment for the rest, it makes a discontinuance 180
- See where iffue is joined to part, and demurrer to the refidue, after divers continuances a discontinuance recorded ibid.
- 6. The plaintiff cannot discontinue after a rule for judgment for the defendant 179

Or motion for judgment as in case of a nonsuit, n. ibid.

- 7. Yet a discontinuance may be by leave of the Court after a special verdict, not after general 178
  Not allowed in a bard action, or
- to let in contradictory proofs, n. ibid.

  8. Statute 32 H. 8. c. 30. extends to all discontinuances, as well of Court as process, both in inferior and superior Courts

  177
- 9. Continuances are not entered in B. R. till the plea roll is made up (wide 420.)

10. Out-

10. Outlawry of the plaintiff between action brought and plea pleaded, need not be pleaded puis darrein continuance Page 178

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12. A wenire returnable 23 Ollober, and the distringus tested the 24th, is a discontinuance \$1

13. If a defendant makes a discontinuance by his demurrer, the plaintiff may either take judgment or join in demurrer

14. A demurrer in bar to a plea in abatement makes a discontinuance 194, 218

15. So does a demurrer to a demurrer (2.)

16. Several bars may be pleaded to feveral parcels of a debt on bond 180

17. Of discontinuances in replevin, wide 3, 93, 94.

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- a. A summons is necessary in all summary convictions 181
- 2. Where the time therein is impossible it is no fummons ibid.

  Appearance cures all defects in the fummons, n. ibid.
- 3. In convictions on 43 El. for cutting trees in the night, their nature and number must be shewn
- 4. A plea of title to such conviction shall not be received, per 3 contra Helt, and St. John's case, 5 Co. denied
- 5. On conviction of deer-stealing each offender forfeits 30 l. the statute being respectively forfeit ibid.

  The question in all cases is, Whe-
- 6. In convictions before justices what appears upon evidence will not fupply a defect in the charge 385,
- 7. It is the conviction of a crime,

and not the punishment, that makes the infamy Page 689, 690 8. On conviction of forcible detainer the defendant refused to be bailed

See also Indicaments.

# Countance of Pleas.

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2. An immemorial usage ought to be shewn, and then an allowance in B. R. or Eyre 184

3. And the record of fuch allowance must be produced ibid.

4. In ejectment for lands in the life of Ely, after non culp. pleaded, a fuggestion of conuzance was entered on the roll without any nient dedire or confession of the other party, yet held well 283

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Coparceners, vide Joint-tenants.

# Copybolds and Copybolder.

- 1. A writ of right lies not of copyhold lands 186
- Steward of a copyhold manor may take furrenders out of the manor
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Custom contra weid, a. ibid.

3. Surrenderse of a copyhold is within the equity of the statute 32 H.8.

 An admittance relates to a furrender, and the furrenderee's title begins from thence ibid.

5. Equity ought only to supply a surrender against the heir in favour of a son or daughter, &c. 187 In what cases the difect of a sur-

render will be supplied, n. ibid.

6. Causes of forseiture of copyhold lands do not descend to the heir

7. Tenant for years makes a feoffment, it is a forfeiture; not fo where he makes a leafe for a longer term 187

8. Copyhold lands are parcel. manerii, freehold

freehold lands are held at de mansrie. Note. Page 186

 Custom in a manor to grant lands by copy to two or three for their lives, babend fuccessive, &c. a grant to A. babend. to him for the lives of A. B. and C. is warranted by the custom

ao. If a copyhold tenant pur auter wie die, the lord shell enter, and there is no occupancy ibid.

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12. Also rent to A. pur auter vie ceases by A.'s death ibid.

13. The act of a copyholder cannot alter his cleate in prejudice of the lord ibid.

14. Copyholds are included within an exception of demeans of the manor 573

#### Corozer.

- z. Where there is but one theriff, and he challenged for favour, the vezire, &c. must go to the coroners
- 2. But if two sheriffs are, and but one only challenged, it must issue to the other sheriff ibid.

 So if two coroners are, and one is challenged, the other must act ibid.

 If a coroner's inquest be quashed, he must make a new one, fuper vifum corporis
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5. But if a melias inquirendum be on a male se gessit of the coroner, the inquiry most be before the sheriss, or commissioners upon assidavits; for none but the coroner can inquire super visum corporis ibid.

6. He may cause the body to be dug up soon after the burial, but not a long time after

7. See a coroner's inquest qualitéd because the wound not set forth, nor that the party died of it ibid.

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Also the election may be in one body, and approbation in another 436

2. The furrender of a charter of incorporation is void without furoffment

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4. A corporation must have a name either expressed in the grant or implied in the nature of the thing

5. They may do an act upon record without their common feal, but not in pair

6. At common law no officer was bound to fign a return ibid.

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8. See the difference between a corporation and a fraternity 193

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4. No costs are allowed on demurrers to pleas in abatement to either plaintist or defendant 194

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6. Costs texted upon a certiorari, are to be only the costs in B. R. 55

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- 7. Profecutor cannot move to aggravate the fine after his accepting costs Page 55
- 8. See an exposition of the rule for putting off trial upon payment of
- 9. Note; Issues are never estreated by special rule, unless in extraordinary
- 10. See exemplary issues ordered to be returned against the E. I. Company 191

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- 1. See the description of a cottage, curtilage, messuage, &c. 169
- 2. And that the stat. De Extenta Manerii says a cottage contains a curtilage, &c. ibid.
- 3. The ordinance de terris mensurandis is an act of parliament 195

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- 1. A. lets a house excepting two rooms, and is disturbed therein, covenant lies not
- 2. Aliter if excepting a passage thereto, and he be disturbed in that ibid.
- 3. Where a bond or covenant to indemnify is made before the first condition, it is forseited by the breach
- 4. Aliter if given afterwards, or to indemnify against a single bill ibid.
- 5. Assignee is not liable to a breach incurred before assignment 199
- Though covenant may be brought on a deed-poll, yet none can bring it unless named in the deed 197
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- 7. Covenant to discharge from taxes tends only to subsequent taxes of the same nature, not of different natures 198
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ing freets

8. Grantee of a rent-charge cannot bring covenant against affiguee of

- the same land ibid.

  9. Diversity where a covenant is avoided by subsequent flatute, and where
- not ibid.

  10. Where a conveyance of land is void to as no effect passes, all de-
- void, so as no estate passes, all dependant covenants are void also
- 11. Aliter of independent covenants
- 12. That a covenant to repair runs with the lands, and the reason thereof, wide
- 13. What words will make a covenant joint or feveral 303
- 14. See the case of a mortgagee's covenanting that the mortgagor shall quietly enjoy till default of payment, &c. 245

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- 2. A court that has power to fine or imprison is a court of record ibid.
- 3. All misdemeanors of judicial officers are contempts of B. R. 201
- 4. See the proceedings and process of inferior courts, and of punishing jurors there ibid.
- 5. See an attachment against a judge of a corporation court for granting a new trial 201, 650
- 6. In a prefentment in a court-leet, it is not necessary to shew how nor que jure the court is held 200
- 7. Where the jurisdiction of a court is limited in things, and they hold plea of other matters, all is void
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9. So where a matter is averred to be within the jurisdiction, if the defendant does not plead to the jurisdiction he is eftopped Page 202

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Such a custom is good; but a by-law without a custom woid, n. ibid.

3. See the difference as to such a custom between Loudon and other cities 204

4. Anciently the king's grant to have guildam mercateriam made the town a corporation ibid.

5. This action ought to have been brought by the guild or corporation ibid.

6. See the difference between general customs whereof the law takes notice, and special customs which must be pleaded, vida 184, 243

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2. By 2 W. & M. f. 1. c. 5. The plaintiff shall recover treble costs as well as treble damages ibid.

3. Where a statute gives a penalty to the party grieved he shall have costs; contra if to the informer 206

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5. The Court are bound by the clause in 21 Jac. c. 16. for increasing costs, but the jury not 207

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8. Upon a recognizance of bail no damages can be given occasione dilationis executionis 208

 Husband and wife declare upon an indeb. assump. to them as executors, on nonsuit they shall pay costs

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Not liable in trover; 1st count, Trover and conversion in the testator's life. 2d, Trover in his life, conversion after. 3d, Both after 1d.

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2. If a deed bear date one day, and be delivered another, it was really dated when delivered Page 76

3. But as to the clause geren. dat. Sc. it seems otherwise, and differs from a data or enjus dat. Sc. ihid. Et vide p. 463

4. If an award be pleaded without date, it must be computed from the delivery 76

5. An impossible date is no date, and a plaintiff must declare of the time of making, &c. 463

6. A lease to commence a data includes the day of the date, per 3 centra Treby 413

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- 1. Debt lies for sheriff's fees of executing an elegis 209
- 2. It lies in the Marshalsca on a judgment had in B, R. ibid.
- 3. In debt for rent on a lease at will occupation must be shewn ibid.
- 4. In all cases where debt lies an indebitatus assumpsit will lie, sed non e contra 23
- 5. Where the same hand is to receive that ought to pay, it is an extinguishment of the debt, wide 305

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- 1. It lies on warranty of a horse to be found that wants an eye, &c. 210
- Where the feller has the possession of chattels, the bare affirming them to be his makes a warranty ibid.
- 3. Aliter where he has not possession, for there is room to question his title, and caveat empter 211

  This opinion denied, n. ibid.
- 4. But fuch affirmance is no warranty

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chasor that the rent is more than it is ibid.

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# Declaration, p. 22.

- 1. See the diversity between charging a prisoner with the declaration in term-time and in the vacation (vide note)

  213, 214
- 2. In case for maliciously holding to bail, the declaration is to recite the sum due and the process specially,

3. In confiderations inde super se affumpsis, not saying the desendant assumptis, held well after verdict 26

4. Mistakes in a declaration cannot be taken advantage of on a plea in abatement 212

5. In marr. by administrator, want of alleging by whom committed cured by pleading non of factum 37

6. On administration granted during the absence of J. S. the marr. must aver that J. S. is absent 42

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18. A declaration in ejectment mult flew the quantity of each fort of land 254

19. Where the count shall abate for repugnancy 213

20. See a declaration on copyhold land, not faid ad voluntatem domini held well after verdict 364

See also Recognizances, 1 and 2.

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a. Where a deed runs in the first person, figning and scaling makes A. a party though not named therein

2. Where one is bound by deed to do an act, of which he is to give notice, though the notice is dispensed with by becoming impossible, yet the act must be done ibid.

3. Upon non off factum found against a deed it may be kept in court, alter if on a collateral iffue 215

4. Where the deed or writing is only produced as evidence, and the action not founded on it, the defendant cannot have a copy ibid.

fendant cannot have a copy ibid.

5. An obligation delivered by A. to
C. to the ale of B. is a deed till
B. refales
30:

See also Obligations, Oyer, and Releases.

Deer-stealing, vide Convictions, Indiaments, and Principal.

## Default.

t. Where a defendant makes default at aif prins, no judgment can be given for him, nor repleader awarded 216

2. In personal actions the first default

before, and the fecond after iffue joined is peremptory Page 216 3. Where upon default after iffue

joined the inquest shall be taken by default, and where judgment may be given ibid. and 217

4. But in appeal of rape, if after iffue joined the defendant makes default there thall be neither 217

5. Default may be waived in real actions, not in personal ibia.

 The day of nifi prius not being the fame with the same day in bank, a default at misi prius cannot be waived at the day in bank ibid.

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A plea without defence may be refused, but is made good by acceptance 217

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- Demurrer to a declaration in trover de duobus falcris, &c. plaintiff may release damages as to that 218
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- 3. But iffue being joined on another promife, the demurrer was flayed and may be cured by verdict 218
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- 5. A demurrer for duplicity must shew wherein ibid.
- 6. A demurrer may be to part and iffue to the other part 218, 219
- 7. No demurrer can be in abatement, and if there be, the Court will give final judgment 220
- 8. If a defendant makes a discontinuance by his demurrer, the plaintiff may either take judgment or join in demurrer
- 9. See judgments on demurrers 402,

See also Estoppel, Pleas, &c. Denizens, vide Aliens.

#### Desdards.

- 1. Where several things move ad mortem, they are all desdands Page 220
- 2. As where a cart overturned and threw a person from it before the wheels of a waggon which ran over the man, and killed him, both the cart and the waggon, and all the horses of both, are declards ibid.
- So if a tree fall on the branch of another tree which breaks and kills a man, both are forfeized ibid.
- 4. So if a horse throws a man in a river which carries him down to a mill where he is killed with the wheel

The Courts do not give countenance to decodands, n. ibid.

## Departure.

- 2. In trespais to a justification by distress, if the plaintiff replies an abuse, it is no departure 221 2. as to diffress for rem fince stat.

  11 G. 2., n. ibid.
- So is trespess, if the defendant justifies on the day in nerr., the plaintiff may allege another day in his replication
- 3. And so he may in affum/fit; for the time is but circumstance, and if the defendant force him to vary it is no departure
- 4. Nor is a varying from that which is not materially alleged any departure 222
- 5. But where performance is pleaded,
  of excuse is afterward
  fet forth in the rejoinder, it is a departure 221

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   Desinue of charters no plea in
- dower after imparlance 252

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# Devife.

- No confiruction or implication to be admitted against the express words of a device Page 226, 227
- 2. And where a particular effate is expressly devised, a contrary intent is not to be implied from subsequent words
- 3. Expressio corum que tacite infant nibil operatur (in margine) 233
- 4. The testator's intent is to be collected from the words of the will, and not extrinsic circumstances 235 Light may be thrown upon a will by the averment of distinct facts, n.
- And words in a will that are good fense in themselves, are not to be transposed
   236
- 6. And the legal sense of the words is to be taken, if a contrary sense be not manifestly implied 228
- The word (granted) in a will confirmed as if it had been, agreed to be granted 225
- 8. Note; Matter that cannot appear till found, when found is not to be regarded in the exposition of wills. Vide fup. pl. 4.
- What words in a will give only an effate for life, and what a fee, withont heirs

Where there is a particular effats devised, a contrary intent is not to be implied from subsequent words

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  The principle of raising devises by implication, n. ibid.
- 10. The words all my offate, in a will, pass both the thing and all the teftator's interest therein ibid.
  - Concerning the word efface or efface in a will, n. ibid.
- 11. So, I give all my effate, right, title, and interest in, &c., and also the bouse called, &c., gives a fee in the house
- 12. So the words, whatever elfe I have not disposed of, will carry a fee in a will
- 13. So a devise to A. for life, and then to be at her disposal, &c. gives an estate for life with power to dispose in fee ibid.

14. See

14. See the difference between a power appendant to the effate, and where it is collateral Page 240
15. Yet a device of all the lands I fhall have at my decease will not pass lands purchased after the device

26. But it feems otherwife in devices of chattels and perfonal effate, wide ibid. (and note) 228

27. A device of a term of years to leveral successively for life, after all are dead, the devisor's executor shall have the residue 231

18. A device to the first son of A. (A. having none at that time) is void

19. But a devise to an infant in ventre

famere, is good, because in esse 230

20. Devise of the rents and profits

of lands to A. to be paid by the executors, is a devise of the lands

to A.

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21. Limitation of a term to A. and the heirs of his body, and if he dies fans issue, living B., then to B. is good 225

22. Devise to A. and B. and their heirs, and the longer liver of them, equally to be divided between them and their heirs, makes a tenancy in common 226, wide 391

Other cases of tenancies in common, ibid.

#3. A contingent remainder mult velk during the particular effact, or so inflants that it determines

228, 238
24. Erge a remainder to the right heirs of J. S. is void, if the particular effate determines in the life of J. S.

of J. S. 238
25. A device to A. for fifty years if he so long live, remainder to the heirs-male of A., remainder to B., the last remainder takes effect prefently, because the first remainder was void

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26. A devife to A. for life, and if he have iffue-male, then to such iffue-male and his heirs; and if he die without iffue-male, to B. and his heirs; A. has but an estate for life, and both remainders are contingent

27. Note; There may be a possibility of reverter where no remainder can be limited (wide supra N° 17.)

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28. A device by the father to the fon and his heirs for ever, and for want of such heirs then to the right heirs of the father, is an estate-tail in the son

29. A. having a remainder in tail with a reversion in see, devises to one son in tail, remainder to the other in see, is good, because it alters the tenure

 Devife to A. if B. a firanger dies without iffue, is an executory devife ibid.

31. Aliter if B. were tenant in tail with remainder to the devisor ibid.
32. See the three kinds of executory estates, and within what time an

executory estate ought to arise 229
33. A limitation per verba de prasinti
will make an executory devise:

aliter if per verba de future 226
34. A. having two daughters, one
has a fon and dies, A. devices lands
to the fon, he takes by the device,
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Diocest, vide Administrations, Bishops, &c.

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2. And coverture to avoid such discent must be continual ibid.
So any other disability taking a

cose out of a statute of limitations, n.
ibid.

 Where the same estate is devised to one which he would have taken by discent, he is in by the discent, notwithstanding the possibility of a charge ibid.

If the effate is the same in quality, the heir takes by discent, notwithflanding an absolute charge, n. ibid.
4. Yet A having two daughters, one has a son and dies, and then A devices to the son, the son takes the whole by the devise

Ii4 5. And

- And there cannot be a different of a moitty to one coparcener as heir Page 242
- Berough-english lands descend to the representative of the youngest fon
- 7. For where collom makes an heir, the law implies all incidents in the course of discents ibid.
- But a difference is between general customs of which the law takes notice, and special customs ibid.

#### See also Heir.

# Discontinuones of Estate.

- 1. A., tenant in tail, levies a fine to B. for B.'s life with warranty, and after levies a fine to the use of A. and his heirs with warranty 24.4
- The first fine was a discontinuance, but it was only a discontinuance during the life of B. ibid.
- 3. For a discontinuance remains no longer than the wrongful estate that causes it ibid.
- 4. Nor could the second fine enlarge the discontinuance, because thereby the estate returned back to the country ibid.
- And if the fecond fine had been to a firanger, yet during the life of the first conusee it made no discontinuance ibid.
- 6. There may be a discontinuance which turns the estate to a right, and not take away entry 245
- Discontinuance of Actions and Process, vide Continuance, &c, and p. 218, 219, 329.

# Diffeifin and Seifen.

- s. Mortgagee covenants that mortgagor shall quietly enjoy till detault of payment, and then assigns
- 2. After such assignment mortgagor is only tenant at sufferance, but his continuing in possession does not turn the term to a right, nor make a dissession 245, 246

  The nature of a mortgagor's an-

The nature of a mortgagor's interest, n. ibid.

- 3. An entry in ejectment is not a real entry, nor shall it avoid a fine or make a feifin Page 246
- 4. A bare entry on another without an expulsion makes only such a scisse, that the law will adjudge him in possession only that has the right, but not work a difficien ibid.
- 5. Where an office is a freehold the denial of fees is a differina 333

See also Entry forcible.

Differiers, vide Church of England and Universaties.

# Diftrefs.

- 2. What things are diffrainable or not wide 240
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- 8. A termor for years cannot declare on a que estate 363
- 9. A verdict will not aid a bad title

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K k 4

Note

Note conterning informations Page 374 31. No process can issue on intermations before a recognizance given by the informer 32. Information or popular action on penal flatutes made before 21 Jac.1. c. 4. cannot be brought into B. R. unless for facts done in the county where the court fits 33. Also debt lies not in B. R. on any penal statute made before 21 Jac.1 .; secus of penal acls made fince The jurisdiction of the suferior courts is only excluded aubers the inferior bad concurrent jurisdiction both as to the subject matter and manner of proceeding, n. ibid. A statute made and expired before 21 Jac., and continued after as from its first enactment, is a statute of that sime, id. 34. One outlawed by process in information, if he comes in and reverses the outlawry, must plead infeater to the information 35. See an information, que warrante they admit persons not inhabitants to be freemen 374 36. And note the different judgments on writs of que warrante and informations 37. A coroner's inquisition quashed because the wound not set forth, nor that the party died of it 377 38. A coroner may cause the body to be taken up foon after burial, but not after a long time See more of Inquisitions and Informations in Office for the King, Perjury, Riots, &c. and p. 12, 325, 514, 587, 6**6**0. 39. For deer-stealing, if information be in due time, the conviction may be at any time afterwards 40. And in summary convictions appearance aids want of fummons 41. Also such convictions are to be taken firstly against the offender 42. Therefore need not be laid contra pacem, and juxta formam flatuti is fufficient ibid. & 383

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- and lets stables for their horses, not an innkeeper within 4 & 5 W. & M. c. 13. for quartering soldiers
- 2. Note; A lodger is upon express contract, a guest not; if a guest steal it is felony, if a lodger, not 388
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A person requesting to leave goods at an inn is resuled, but whilf he is drinking there they are stolen, the innkester liable, n. ibid.

4. An innkeeper (though part-owner of a ship) held not within the statutes of bankrupts 109

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- A deed may be inrolled without the examination of the party, upon proof by witnesses of its delivery 389
- 2. The party died before acknowledgment, yet the deed was inrolled ibid.
- 3. And where two are parties, acknowledgment by one binds the other ibid.
- 4. A rule that all deeds be acknowledged on the plea-fide and in open court ibid.

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2. Grant of 100 l. rent to five equally to be divided, to hold to them, wiz. 20 l. to each, &c. they are jointenants 390

3. So a grant to A, and B. babend, one acre to A, and the other to B, they are jointenants

4. One tenant in common may diffeise his companion, i. e. by an actual ouster 392

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- 3. Yet held, that performance in affumpfit amounts to the general ibid.
- 4. In trespass, plea, that it was the horse of J. S. and the plaintiff took and impounded it, and that the desendant took him by replevin, amounts to the general iffur

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- Is Is a solution of lands not forfeited by outlawry till inquisition taken; and alienation before inquisition is a bar
- 2. Issues of a jointenant for life are leviable on him in reversion ibid.
- Beafts of a stranger levant and couchant are seizable on a lovari facias ibid.
- 4. So of a jointenant and commoner, unless the title found by the inquificion ibid.

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- 1. The mayor of H. committed for fitting in judgment where he was party, though by the charter the only judge there
- only judge there 396
  2. Where one acts as a judge, his act is not traversable; alizer of an officer, as a constable, &c. ibid.
- 3. A judge not answerable for error of judgment either by action or indictment 397
- 4. Mayor and commonalty of L. may limit penalties of by-laws to them-
- 5. But such penalties cannot be sued for in the mayor's court; aliter if the mayor could be severed 397.
- Mayor is head of the corporation, and an action by them abates by his death ibid.

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- 2. Judgment may be given after the plaintiff's death, if it be within two terms after verdict 401
- 3. There must be four days exclusive between the day in bank and the figning of judgment 399
- 4. In what cases judgment may be entered on the peremptory rule without motion ibid.
- 5. Judgment on demurrer to a plea must be entered with et quia videtur curia quad placis. pradia. Ec. 402
- 6. If the plaintiff in a monfirans of droit fails in his title, no judgment need be given for the king 488
- 7. See the forms of entering judgments on non pros, &c. 455, 456
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- 10. Warrant to confess judgment by a feme, who afterwards marries, is thereby revoked 399
- II. Yet judgment confessed by a feme covert refused to be set aside on motion
- 12. Where a judgment is confessed on terms, the court will take notice of them; aliter if the agreement is subsequent 40
- 13. Judgment for a scandalous libel altered the same term, and the punishment increased 401
- 14. Upon writ of inquiry after interlocutory judgment, where the final judgment must be against the administrator 42
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17. Judgment of a fuperior Court is only voidable, though a private statute fays it shall be void P. 674

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19. No reference for irregularity after writ of error brought ibid. 20. What judgment shall be given on

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arifing without the jurisdiction, where it is so alleged, and there is no plea to the contrary, ib.—Vide Taylor v. Blair, 3 T. R. 453.

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5. See a diversity where two Courts

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4. And in trespais such command, Gc. is traversable; contra in replevin ibid.

- 5. In trespass for taking goods the officer need only shew a writ of execution ibid.
- Secus of a common person, unless in aid of the officer by his command ibid.
- 7. Where a principal officer justifies under a returnable writ, he must shew it was returned; fecus of sub-ordinate officers ibid.
- A serjeant at mace justified under a precept on a plaint in replevin, and held ill because not shewn it was returned ibid.
- g. In imprisonment justification by order of Court of Conscience to carry the plaintiff to the Compter, held ill, because the imprisonment was confessed, but not shewn to be in the Compter 408

10. Justification by 1 El. c. 17. held ill for want of shewing a warrant

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- 3. The kings of England have not the fole legislative power, and if the king and clergy make a canon, it does not bind laymen without their affent 412
- 4. The king can lay an embargo probono publico only 32
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- 1. A lease for a year, and so from year to year, quamdiu, &c. is alease for two years certain, and after at
- 2. When a lessor or lessee at will may determine his will, vide bis ibid.
- 3. Termor for years grants for a less term to commence after his death, it is good ibid.
- 4. A parol demise to hold from year to year, & fic ultra quamdiu, &c. is a leafe for two years 414
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1. Any piece of money coined at the Mint is of value as it bears proportion to other current money, and that without the king's proclamation

z. The units being raised 16d. by King James I. was the occasion of coining guineas, viz. at 20s.

3. In indeb. affump. to pay 13 l. 10 s. for nine guineas received, not necessary to shew the number of guineas (vide 9, 22.) ibid.

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- 2. A corporation may fue by their name of incorporation, though they have express power to sue by another
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- 5. On certierari to remove orders, the name of the parish in the writ and that in the order must be the same
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- 3. Office granted at will is at the will of the king, and not of the party, and may be furrendered 465
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- A release of all demands to the personal estate of the intestate, releases not a bond before judgment and execution ibid.
- Where one releases his right he cannot pursue his action or remedy
- 7. But if he has a right and several remedies, the discharge of one remedy discharges not the other ibid.
- 8. Where a provise goes by way of defeazance of a covenant, it must be pleaded on the other side 574
  - But otherwise, where it is by way
    of explanation or restriction of the
    covenant ibid.
  - to. A growing rent is not released by a release of all demands 578
  - 11. One bound to release on payment of money, is bound to release on tender and resultal

# Remainder, vide page 591.

- 1. Every remainder is to vest during the particular estate, or eo instanti it determines 228
- 2. And a right of entry must be prefently upon the happening of a contingent remainder 577 Note concerning the union of the remainder with the particular estate
- ibid.

  3. A right of entry will support a contingent remainder, but right of action not
- 4. Surrender of tenant for life, being non compos to a remainder man, 1s void, and cannot bar a contingent solid.

5. A. tenant for life, remainder to his sift, 2d, fons in tail, remainder to A.'s right heirs; A. commits treason, and then has a son, and is then attainted; the contingent remainder to him not discharged by vesting in the crown during his life, because the wise's estate is sufficient to support it

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A remainder may be of a rent de

6 A remainder may be of a rent de

See also Devises, Grants, and Reverfions.

Remedies, vide Actions in General, Release, Rights, &c.

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Rents, vide Day, &c. Release 10. and pages 466, 577, 578.

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- 1. Repleader not allowed before trial, not after a default 570
- 2. When awarded, the parties are to begin de novo at the first fault ib.
- 3. If denied where grantable, or granted where it should be denied, it is error ibid.
- 4. Where a defendant makes default at nift prius, no judgment can be for him, nor repleader awarded
- 5. Repleader cannot be where a trefpass is confessed 173 Repleader only awarded subsec

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- 1. A replevin may be by plaint in the country, as well as by original here 701
- 2. Bailiff of a hundred cannot grant replevins out of court 580
- 3. Clerk of the county court granted a replevin without bond or furety to profecute 467
- 4. The sheriff in replevin cannot return that the cattle, &c. were not taken 581
- 5. But after elongata returned and withernam

withernam awarded, the defendant may plead men ce; it 6. Upon pleading non cepit or claiming property, the defendant shall have his goods again ibid. 7. So in a bomine replegiands he shall be bailed on a nen cepit ibid. 8. But on elengate returned therein, if he pleads non cepit, no witherman shall issue And in bomine replegiande, the defendant cannot be bailed before return of the withernam 10. Also the plaintiff is demandable on return of the withernam, and may be nonfuit for not appearing 11. And there may be a new capias in withernam after the defendant had been bailed on the first 582 12. For a withernam is only mefne process, and not an execution 14. Want of addition not pleadable to a bomine repligiando or replevin 14. In replevin property in a stranger is pleadable in bar or abatement, (vide Abatement) 15. How prifel in auter lieu muft conclude, and must make suggestion for a return 3, 94 16. And all pleas in abatement in replevin (except property) must fuggest matter for a return 93, 94 27. Second deliverance is a Superjedeas to the retorno babendo, but not to the writ of inquiry 18. In a plea in bar of tender of rent in replevin, Q. If the money is to be brought into court, vide 583, 19. But see the reason why it shall 20. And therein de injuria sua abjque bec quod fuit in aretro, amounts to the general islue 21. Note; The command or authority in replevin is not traversable

22. Avowry for rent where part is not yet due is error, but may be cured before judgment by abating

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the avowry as to that

# Requeft.

1. If A. requelts B. to take goods; and B. does it, &c. A. is a tref-paffer Page 409

 Condition to do an act at the end of feven years on request, request must be made on the last day 585

3. Where a request of departure, &c. is necessary to make one a trespasser

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# Refent.

I. Attachment for a rescue is never granted upon assidevits \$86

2. But a rescuer may be discharged on assidavita ibid.

3. The fine for a refere is four nobles on each offender ibid.

This rule exploded, n. ibid.

4. A return, that the bailiffs had him in cuflody of the fheriff, and that A rescued him out of the custody of the bailiffs, is ill, for repugnancy ibid.

See also Arrest of Body.

#### Restitution.

1. Writ of reflication lies not against any that are not parties to the record

2. Where money recovered in a judgment appears by record to be paid, restitution shall be jans scire faciar

3. But otherwise where it appears to be only levied ibid.

4. So where judgment is fet afide after execution for irregularity, there needs no feire facial for refliction

5. Restitution denied upon quashing an inquisition of forcible entry, a lease for years standing out icid.

 Traverse to an inquisition of forcible entry is a superseded to the restitution

# Return of Writs.

I. Attach. feci is good in a return,

and farplulage in a leturn rejectad Page 580

2. Process whereon to ground a testarum is returned by the attorney of ibid.

g. A return of a certiorari by clerk of the peace is ill

4. Eight days to be between the sefie and return of a ca. fa. against the principal, in order to charge the 599, 602

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# Reversion.

- 1. A. seised of lands a parte materna, limits several estates with remainder to the use of his right heirs, the heir a parte materna shall have it 590
- 2. For it is the sucient use, and therein no difference between an express and implied use ibid.

3. Note; There may be a possibility of reverter where no remainder can be limited 231

4. Of grants of offices in reversion, wide Offices, Gc.

Rights and Remedies, vide Actions in General, 2, 13, 19, 22, 27, 29. Release and page 415, 444, 460, 576, 577, 686.

#### Revocation, vide Wills.

### Riots, Reuts, and unlawful Affemblies.

1. Both an unlawful affembly, and an unlawful act done, are necessary to make a riot, vide bie

2. Erge, If three or more affemble lawfully, though they quarrel and fall upon one of their company, it is no riot

3. Yet in this case, if they fall upon a ftranger, it is a riot, but in those only who concor

4. Indicament for a riot and affault, acquittal of the riot, is also of the affault

5. To an inquisition of a riot upon view, the heriff must be party ib.

6. But if the rioters disperse before Vel. II.

the view, the justices may make the inquisition without him Page

7. And such inquisition by two justices capt. pro domino rege is well, and need not be pro domino rege & corpore com.

8. Yet all inquisitions by grand jury are to be pro corpore com. as well as pro domino rege ibid.

9. Justices not inquiring within the month, are punishable; yet they may inquire after to. If several make a riot and a man is killed, they are all principals in the marder, wide

#### Rivers, vide Highways.

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# Rules of Court.

1. Defeating a rule of court; though by a stranger, is a contempt, wide 176, 177, 596

2. A rule of court is to be construed largely for his benefit for whom made

3. Yet see the exposition of a rule to put off a trial fuper folutione cuftag.

4. See proceedings against the defendant on breach of the rule for confessing leafe, entry, &c. 259

5. And fee breach, &c. of rules of reference to three foremen, bis 73 and 84

6. Also the practice of striking juries on rules of court In what cases goods may be brought ibid.

in in trover, n. 7. And in what cases rules shall be to bring money into court 583; 597, and note.

8. Where executor or administrator fues, money is not to be brought into court, because they are not liable to coffs 596

It may be paid in whereby executors lose, but do not pay subsequent cofts.

Though the plaintiff (in other cases) is nonfait, yet he shall have money brought in, of firiking it out of the declaration 597

Note on the effect of paying money ibid. into court M m See See also Trials, View and Vine.
Rules of Law, vide Maxims.

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#### Scire Facias.

- 1. IN the case of the king, there needs not any scire faciar after the year Page 602
- 2. See the rule for suing out and returning scire facias in B.R. and how it differs from C.B.
- 3. Fifteen days inclusive to be between the teste of the first, and return of the last ibid.
- 4. And eight days between the teste and return, when against the principal, in order to charge the bail
- 5. If against the principal, the writ is in bac parte; if against the bail, in ea parte 599
- 6. A scire facias against bail in B.R. must be brought in Middlesex only;
- aliter in C. B.

  7. A feire facias against bail must lie in the sheriff's hands a convenient time

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It must lie four day: before the return, n. ibid.

- A fire facias on recognizance of bail affigning breach that the defendant did not pay nor render Prijonæ Mar. Marejeb. noftræ 602
- o. Whether a feire facias lay in perfonal actions before West. 2. and Lord Coke's opinion doubted 600
- io. In error to reverse a fine, why it is needful to a feire facias against the tertenants, as well as the conuzees
- 11. A return of scire seci against tertenants ought to be of all the tertenants in balliva sua ibid.
  Where sci. sa. shall issue upon motion, and where without 598
- 12. A feire faciar lies on a judgment in ejectment, and may be general against all the tertenants, or particular, and name them 600

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13. Tertenants returned for feveral parts, cannot join in a plea which goes to one part only

14. Where non-tenure may be pleaded generally, and where specially Page 601

 Judgment on a feire facial against bail reversed for want of warrant of attorney 603

16. See the case of a scire facias upon a recognizance of bail in error 520

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# Service and Suit.

- Service by doing fuit to the court of the manor twice a year, held well 604
- 2. A manor-court to inquire into rents and services arrear, may be bis in anno ibid.
- 3. And the fuit to fuch court shall be intended by refervation, before the farme win emters. See this.
- flatute quia emptores, &c. ibid.

  4. Also one that is refant may be bound to do suit real ibid.
- 5. For it shall be intended a suitfervice reserved on creating the tenure ibid.

# Seffions General and Quarter.

- 1. An appeal may be adjourned from one quarter feilions to another 2.
- 2. Sessions cannot be entered as sitting three days together, but must be an adjournment 494, 605
- 3. An order of sessions quashed because it concerned one of the justices named in the style of the court
- 4. They cannot make an order to profecute an offender out of the county flock ibid.

For what purposes they can order the county stock to be applied, n. ib. 5. They may alter and let aside their

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53+ 7. A ipe7. A special order of sessions ought not to conclude to the opinion of B.R. Page 486

8. They may affirm or quash, but not superfede an original order 472

 They cannot suppress an alchouse licensed, unless for disorder 470
 They may make an original order

to discharge apprentices 491

11. Their power extends only to such trades as are named in the statute (wide Apprentices) 471

12. They are proper judges whether
fit to oblige one to take an apprentice or not
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13. Orders on 43 Eliz. c. 2. must be be said ad quarterialem seffienem, &c.

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14. Orders on two different flatutes
must be distinct 487

25. Seffions on appeal cannot fend to a third place nor party 475

 And one fessions on appeal cannot refer a matter to be determined by another sessions, bis 477

17. If the first order be naught, no subsequent order on appeal can make it good 482

18. And where they quash an order, it must appear to be on appeal 479

 Appeal from an order of baffardy must be to the general sessions 482
 And to the first sessions after notice to the father, of the first order

21. Appeal from an order of corporation justices, must be to the seffions of the county, not the corporation 490

22. Seffions cannot annex parishes, but may order one parish to contribute to the poor of another 480 281

23. On appeal from poors rate, the seffions may quash the whole rate

24. And they may make, or order the churchwardens, &c. to make a new

If the objection is to the general rule and propertion of the rate, or the omission of particular persons, the sessions cannot amend, but must quash or confirm it; secus where the appellant is overcharged, a. ibid.

25. Sessions may appoint and remove high and petty constables, and are the best judges of the matter Page 150, 502

Vide Constables. ..

26. Upon appeal from allowance of overfeers accounts, the feffions must execute their judgment in the same manner as two justices ought to do

27. Seffions being but one day in law, may after their judgment and make a new order, but must certify only the latter 494

28. And they need not fet forth the reasons of their judgment, and how the court shall judge thereon 607,

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# Sheriff.

 A sheriff may take bail-bond on attachment of contempt, but the prosecutor may refuse to accept it 608

Qu. Whether such a bond is good,

The sheriff is not liable to an action for refusing to liberate the defendant thereon, a. id. ib.

2. A sheriff fined and committed for delivering to an infant a writ of appeal brought by his processin amy

3. What fees are due to the sheriff on execution of writs, and his duty therein, vide Fees and Execution; and for his duty in taking ball, see Bail 17, 18, 19, &c.

4. A theriff is the officer of B. R. in the thme manner as conftable to justices of the peace, Q. 175

See also Church of England.

Solicitor, vide Attorney.

Statutes in General, and their Expo-

 Where a flatute gives or creates a right, the party of confequence M m 2 fhall

shall have an action at law to recover it Page 415 3. Where a flatute creates an offence, no remedy can be pursued, but what the flatute gives 460 Where a flatute introduces a new law, by giving an action where none was before, &c. the plaintiff need not conclude contra formam flat. Aliter where it gives the same action with a difference of circumstances, as double damages, &c. 3. Where a flatute gives penalty to be recovered before justices, and prescribes no method, it ought to be by bill 606 6. And orders of fessions on two different flatutes must be distinct 487 7. Where a flatute gives a penalty to a firanger, and be fues, he is a commen informer; aliter if to the party grieved 30 S. Where a statute directs things of a public nature, may is to be taken as feall 9. Where it makes an offence felony, accessaries (properly) are within it, though not named 542, 543 .10. Aliter where an offence at common law is thereby only made more penal 11. Though the title is no part of the flatute, yet if fet out wrong it is fatal 609 Observations concerning the misrecital of flatutes, n. ibid. 12. That the statute 5 Eliz. is a hard 613 13. Ergo, the exercifing a trade by others is within that statute 610 14. Yet following a trade seven years is sufficient, fans binding, &c. (vide Apprentices) 613 Vide n. 15. Where a trade is averred to be so at the time of making the act, the court will intend it within the act, Trades mentioned in the all need not be averred to be used at that time, ethers muft, n. ibid. 16. And that many trades are within the act, not mentioned therein ib.

17. One may let coach-horfes and coach-man without licence, on 5, 6 W. & M. c. 22. Page 612 18 Debt on the flatute 10 W. 3. c. 2, for making buttons of wood ibid. 19. See the confirmation of the flampath, where a bond and warrant of attorney were on the same paper ibid.

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# Statutes of Hue and Cry.

1. Where the fervant is robbed of his mafter's goods, the mafter may fue the hundred 613

2. So where robbed of his mafter's money, the mafter may sue the hundred 614

3. But one robbed and refusing to take the oath, cannot fue 613

4. The declaration need not fet forth the oath to be taken before a justice of the fame hundred 614

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Subfidies, Taxes, and Cuffoms.

1. By taxes, is meant in general, parliamentary 615

2. See the different manner of taxing, and when introduced 616

3. And of the clause in conveyances, to have no deduction for taxes ibid.

4. Where deduction for taxes shall be out of annuities, and where not (vide Covenant 7.) ibid.

5. One may be afferfed by the landtax, either where he dwells, or carries on his employment ibid. An officer employed in different

parifies must be assessed where be lives, n.

6. Prifage, an ancient duty in specie on goods imported, may be granted away by the crown 617

 But are chargeable with duties charged on the faid goods, while in the grantee's hands ibid.

Suit, vide Bervice.

Sunday, vide Term-Time.

Supersedeas, vide page 472, 587. & Certiorari, &c.

#### Surrender.

1. A furrender, where to be confrued as a conveyance at common law Page 621

2. Surronder vells the effate in the farrendree fans notice or his express acceptance 618

3. A furrender vests a fee in A. & ax., though an estate for their lives expressed, &c. wide Tail 620

4. A furrender is to be construed as a conveyance at common law 621

5. Surrender of a patent void for want of enrollment 191

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1. BY what words an estate-tail may be created 621

z. The word of in English, equal to
do or ex in Latin 622

- 3. In a gift in tail it must appear of what body the issue are to come
- 4. To B. and the heirs-males of the faid B. lawfully begotten, and for default, &c. over, is a tail ibid.

5. Fees are absolute, base, restrained, ibid.

- 6. Bargainee of tenant in tail has a descendible estate 619
- 7. What conveyances by tenant in tail are defeafible by the issue ibid.
- 8. Covenant by tenant in tail to fland feifed to the use of himself for life, remainder to A. in tail, is void ibid.

9. Because the remainder is to take effect after his death (2.) ibid.

- so. Tenant in tail covenants to fland feiled to the use of A. and his heirs, or of A. for life, with remainders; it devests the estate-tail
- 21. Aliter if the new use be to take effect after his death ibid.
- s2. Surrender to A. for life, remainder to A and his wife for their lives, and their heirs and affigns, and for default of such issue to A. and his heirs, is a fee in A. and his wife

See also Devises, Fines, Recoveries, Uses, &c.

Tenants in Common, vide Joint-tenants.

Tender and Refusal, Amende, &c.

1. If one is obliged to release on payment of money, he is bound to release on tender and refusal, as if actually paid Page 75

2. When both parties meet at the time and place, he that pleads sender mast also plead refusal 623

3. And if the defendant be ablent, the plaintiff must shew that, and that he was there at the time, and tendered ibid.

4. And the pleader must shew when he came, and how long he said, &c. 624

5. He must stay till sua-set, unless special circumstances shown shall wary it ibid.

6. To a general assumpti, tender, &c. must be pleaded with a tent temps prist, which cannot be after imparlance 622
May be pleaded after an order for time. n. ibid.

time, n.
7. How tout temps prist is pleadable in

indebitatus affumpfit, Sc. 623
8. In pleading tender in debt, the defendant prays judgment de dampnis; but in case, de ulterioribus dampnis ibid.

Owner of a firsy may feize it, tendering fatisfaction, and in pleading it, need not shew the sum tendered 686

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11. Assumpts, fatisfaction pleaded, and iffue upon the acceptance, held good 627 See also Payment, &c.

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2. And the vacation begins the last day of the term, as foon as the court rifes ibid.

M m 3 3. No

3. No matters of law to be heard the last day of term Page 624.
41 But a trial at bar may be the last

4) But a trial at par may be the last paper-day, where the king is party 625

5. Sundays and Holidays are computed for acts done out of court

6. But Sundays are not included in the four days to move in arrest of judgment 625
7. Ergo one may be taken on an

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Sunday

Sunday

Sunday

9. Tres Trin. on Sunday, writ of inquiry then returnable, if executed Monday, it is error 626

of the court takes judicial notice of the computation of time, the kalendar, &c. 626, 627

An infurance of A.'s life for a year, A. died on the last day, the infurer is liable

12. A condition to an act at the end of 7 years on request; request is to be made the last day 585, wide 624

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- 1. A traverse that puts matter of record in issue to the country is ill
- 2. Where a traverse ought to conclude to the country, and where with an averment
- 3. A confideration executory is traversable, erge a venue must be laid
- 4. In replevin matter fuggested for a return in a plea in abatement, is not traversable
- Where traverse of the command is sufficient in trespass or replevin, but not in clausum fregit 107
- 6. And see a difference in traverses on avowries, and declarations in debt, &c. 562
- 7. That which is immaterial is not admitted by not being traversed

8. Where a traverse goes to the matter, all before is waived; aliter where to time only Page 642

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10. In affumpfit satisfaction pleaded, issue on the acceptance is good 627

11. Non antes is no traverse, where further matter must be disclosed before he can conclude to the country 628

De injuria fue proprie is a replication to a justification by the common law or general statute ibid.
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14. On pleading a seisin generally, traverse may be taken that he is

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15. But quere the difference of traversing a sole seisin, as to tenants in common and parceners 630

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- 2. And judgment therein reversed, for want of contra ligeantie fue debitum, in the indictment ibid.
- 3. And another, for want of isle vivente, or in conspectu sue, as to burning the bowels 632
- 4. Record of judgment therein refused to be amended by the minutes of the court of Old Baily ibid.
  5. Indictments of treason, &c. can-
- 5. Indictments of treason, &c. cannot be supplied by intendment 631, vide 375
- Copy of indictment therein not granted, after pleading 634 vide 153
- 7. Indictment of a subject contra ligeantie sue debitum is well, without naturalis, &c. 633
- 8. Aliter where an alien is indicted, if naturalis, &c. be therein ibid. 9. Indictment for compassing the
- king's death, the treason being fift laid, the overt-act need not be laid proditorie 633
- 30. Aliter where the treason confishing in such act ibid.

 Words of perfusion or of confultation only, an overt-act of treafon in compassing the king's death Page 631

12. Indictment for levying war, or adhering to the king's enemies in general, fam shewing particular instances, not good 634

13. Joining with rebel subjects of the king's ally, fighting under the command of an enemy prince, is treasons &c.

14. Although such fighting be directly (and only) against such ally, for it is adhering to the king's every mice.

15. Cruifing is an overt-act of adhering, &c. and so is listing and marching ibid.

36. And there may be a levying war without actual fighting 635

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1. In a declaration in trespass, contra pacem is substance 636

pacem is substance 636
2. And crespass laid in a former king's time contra pacem only of the prefent, is ill on demurrer, but cured by verdict 640

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4. But quare vi & armis is ill, for quare is not positive, but only interrogatory ibid.

5. Trespass, quare duos eques apud D. Sc. Striticum de bonis proper. ipfius A. cepit, held ill, because the property of the horses not shewn, and the conditional damages entire

6. And plea of taking a distress for rent does not confess property ibid.
7. Trespass for entering his house and taking feparal. claves, &c. good fant thewing the number 645

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12. So one that has free warren, may have trefpass against any but the owner of the foil, for hunting there ibid.

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Principles on which new trials are granted or refused—They are not granted if the wordid is agreeable to the justice of the case; or to aid a hard adion or unansworable desence; or for a formal objection; or if there was proper evidence for the jury. They will be granted in general if the wordid is contrary to law, or a matter is left improperly to the jury; but not if there is a bill of exceptions depending, or in a writ of right. The judge's certificate is conclusive. Costs on granting new trials, n. ib.

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3. Ergo Denial is no evidence of a conversion, if the thing appears to be lost by negligence ibid.

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gations and proofs are or not material, D. ibid.

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3. And uncertainty in the count or declaration, is cured by verdict

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Fage 413. n. (b), for 461. read 361.—cd. 4. l. 5. for days read day—for Escin. 401. read 461?

414. n. (a), dele Doug. 378.

421. n. (a), for returned read returnable.

430. n. (b), for 329. read \$39.

465. n. (a), for 282. read 382.

489. pl. 51. l. 4. after him read from.

490. B. l. 4. dele is.

550. n. (a), for 76 read 78.

553. n. (a), for 76 read 1 Vez. 120.

566. n. (a), for county read country.

586. fer 2189. read 2129.

603. n. (a), for 1277. read 1227.—for 1058. read 2048.

605. n. (a), for 29. read 59.

628. n. (a), add 81.

A Property and







